ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Costs and Sanctions

- **Costs**
- **Contempt**

Consultation Memorandum No. 12.17

February 2005

Deadline for Comments: March 25, 2005

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ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* [The Rules] with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project Costs Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:
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This Consultation Memorandum is the result of a composite effort by a number of ALRI staff and former staff. Cynthia L. Martens; Margaret A. Shone, Q.C; Hilary I. Stout and Doris I. Wilson, Q.C. have conducted the research and have written the Consultation Memorandum. W.H. Hurlburt Q.C. has seen to the final stages of assembling their work.

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the

Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website:

http://www.law.ualberta.ca/alri

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgments and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2005

No.	Title	Date of Issue	Date for Comments
12.16	Trial and Evidence Rules Parts 25 and 26	November 2004	January 15, 2005
12.17	Costs and Sanctions	February 2005	March 25, 2005

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ALBERTA LAW REFORM INSTITUTE

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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by March 25, 2005.

Under the rubric of "Costs", this consultation memorandum deals with a wide range of subjects, including party and party costs, solicitor-client accounts, taxation, costs as penalties, and several specific topics. It also deals with the rules relating to contempt of court.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Costs Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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- a party whose position has been proved wrong has imposed on the other party the need to bring or defend the litigation and, for the sake of fairness, should be required to compensate the other party for the costs so imposed;
- the prospect of having to pay the other side's costs may inhibit a party from bringing forward a meritorious claim or defence. On the other hand, it may also inhibit a party from bringing forward an unmeritorious claim or defence;
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EXECUTIVE SUMMARY

INTRODUCTION

This Consultation Memorandum invites comment about the numerous issues raised by it. It is the work of the Costs Working Committee of the Rules of Court Project. Part I covers the subject of Costs. Part II covers the subject of Contempt.

PART I – COSTS

Party and Party Costs

The Committee proposes the following general principles:

- a preamble to the costs section of The Rules highlighting principles of fairness, predictability and efficiency;
- a default system of partial indemnity for lawyers fees;
- retain the existing factors guiding the court's discretion in costs awards, but add the extent of success of a party as an additional factor.

Views are sought on the following topics:

- how court discretion should be exercised;
- how to keep a tariff like schedule C up to date;
- whether a party should ever be entitled to more than full indemnification;
- whether expenses incurred before action should ever be included in party and party costs.

Changes to Tariff Items

The Committee suggests:

- a specific item for a review of produced records;
- a specific one-time only item of preparation for examination for discovery;
- a specific item for motions to compel, later abandoned.

Items not to be added:

- judicial dispute resolution;
- summary trial;
- appeals to Court of Appeal on interlocutory motions.

Views are sought on whether a specific item for settlement should be added to the tariff list.

Other Tariff Items

The Committee suggests some amendments:

- continue the rule that the costs of an interlocutory proceeding must be paid by the unsuccessful party forthwith in any event of the cause, but exclude *ex parte* proceedings;
- interlocutory motions excluding *ex parte* motions, continuing the rule that costs are payable in any event of the cause;
- the Committee believes that Schedule C amounts are adequate, but asks whether the rules should address the issue of multiple column amounts;
- the Committee suggests a tariff guideline of two-thirds of the normal costs for self-represented litigants;
- Committee seeks the views of the profession on how costs should operate where an action has been commenced in Queen's Bench that could have been commenced in Provincial Court.

Miscellaneous

Minor changes are suggested to:

- compromise using court process, including deleting Rules 166 to 160;
- security for costs;
- costs of litigation representatives;
- solicitors liens and charging orders.

Costs as Sanctions

The Committee makes the following suggestions with requests for comments as indicated:

- an omnibus rule for costs as sanctions;
- should the omnibus rule contain factors?;
- carry forward existing rules relating to
  - Rule 128 (failure to admit);
  - Rule 230 (non-admission after notice to Admit);
- objections to admissibility of expert reports;

- Rules 599.1 and 602 in respect of failure to comply and counsel liability.

Taxation

The Committee suggests the following changes relating to taxation:

- a change in terminology introducing terms such as "assessment" and "assessment officer";
- reorganised rules;
- retaining powers of taxing officers;
- retaining process for party and party costs taxation;
- create a statutory foundation for taxation of solicitor and client accounts;
- retain taxing officers' discretion in solicitor and client accounts;
- retain provisions for taxation of contingency fees, and extend to retainer agreements;
- remove taxation time limits in The Rules;
- require an affidavit in support of an application for judgement after taxation, to outline liability and amounts outstanding including interest.

The Committee seeks the views of the profession on the following questions:

- Should court clerks who do taxations receive annual training?
- Should all solicitor-client taxations be done by specially qualified taxing officers?
- Should a specially qualified roving taxing officer be appointed to do solicitor-client taxations outside Edmonton and Calgary?
- How much discretion should a taxing officer have in adjusting the fees fixed in the tariff? Should more or less discretion be given to the taxing officer?
- Should a specialized taxing officer serve as a first level of appeal from the taxation decisions of clerks?
- Is it feasible to increase the jurisdiction of taxing officers:
  (i) to deal with the question of apportionment between lawyers in the case of a contested contingency fee?
  (ii) to vary regular retainer agreements, similar to their powers in dealing with contingency agreements?

PART II – CONTEMPT

The Consultation Memorandum canvasses the rules relating to contempt (Rules 701 to 704, and Rule 366(b) which relates to directors of a corporation), and discusses a number of issues relating to those rules. In the Costs Committee's view, these rules, together with the related jurisprudence, are satisfactory. The Committee does not propose any changes.

INTRODUCTION

[1] "Costs" is a term with a variety of meanings. Under one or another of those meanings, costs are an important part of The Rules, appearing frequently in individual rules. Costs are the subject of Part 47, which deals with costs between parties and lawyers' accounts to their own clients, and they are frequently referred to elsewhere in The Rules.

[2] In Part I, Chapter 7, this Consultation Memorandum seeks comment on a large number of issues arising in connection with "party and party costs," that is, the amounts that one party to litigation must pay to the other party for expenses incurred by the latter in the course of the litigation. The chapter deals with the principles on which costs should be awarded and how the amounts awarded should be determined. The chapter also deals with associated topics, e.g., security for costs; fees of court officials; and solicitors' liens and charging orders.

[3] In Part I, Chapter 2, the Consultation Memorandum deals with the taxation and enforcement of accounts rendered by lawyers to their own clients, that is, the determination of what charges and disbursements should be paid by a client to a lawyer, and the factors that should be considered, including the reasonableness of agreed and contingency fees.

[4] In Part I, Chapter 3 and Part II, the Consultation Memorandum then deals sanctions for misbehaviour by way of costs and contempt proceedings.

PART I — COSTS

CHAPTER 1. PARTY AND PARTY COSTS

A. Basic Principles

ISSUE No. 1
Upon what principles should a party to litigation be required to pay costs to another party?
There are a number of conflicting considerations:

- **a party whose position has been proved wrong has imposed on the other party the need to bring or defend the litigation and, for the sake of fairness, should be required to compensate the other party for the costs so imposed;**
- **the prospect of having to pay the other side's costs may inhibit a party from bringing forward a meritorious claim or defence. On the other hand, it may also inhibit a party from bringing forward an unmeritorious claim or defence;**
- **the prospect of recovering costs from the other side may encourage a party to bring a meritorious claim.**

[5] The Committee considered the underlying rationales for costs in conjunction with the principles that guide the Rules of Court Project generally. The Committee is of the opinion that in addition to the principles underlying the project, the following principles are also relevant to costs issues:

- costs should strike a balance between the interests of plaintiffs and defendants;
- costs should provide an incentive to settle early in the action and at different stages in the action;
- costs should facilitate access to justice;
- calculating costs should be a simple, workable process;
- predictability of costs at each stage of an action is desirable;
- the effect of punitive costs rules should be reviewed to determine if they are used appropriately.

[6] The Committee suggests that there be a preamble to the costs section highlighting principles of fairness, predictability and efficiency in costs awards.

ISSUE No. 2
Should a successful litigant *prima facie* be entitled to costs? If so, what is the appropriate level of indemnity for counsel fees?

[7] Rule 600(1) defines "costs" for the purpose of awards of costs between parties to litigation. These include the charges of barristers and solicitors, that is, lawyers' fees, for which a partial indemnity is the default position. They also include other expenses incurred in the litigation, including fees of experts and court officials and witness fees, which, if properly incurred, are usually payable in full as part of a costs award. No issue has been raised with respect to these other expenses.

[8] Alberta presently uses a partial indemnity system for the legal costs component of party and party costs. It is premised on the assumption that a winning party is deserving of some compensation for legal costs incurred in establishing or defending its position, but recognizes that full indemnity of legal fees can significantly hamper access to justice in many cases. Accordingly, Schedule C of The Rules is intended to award approximately 30-50% of a winning party's actual legal fees, subject always to the discretion of the court to vary a costs award.

[9] Other jurisdictions emphasize different principles associated with legal costs, resulting in very different costs regimes. One alternative system of costs is that of a "no costs recovery" regime, commonly seen in American jurisdictions. Each party bears its own costs unless there has been egregious behaviour by one of the parties. On the opposite end of the spectrum is the approach taken in most civil law jurisdictions, being an entitlement to full indemnity of all legal costs if ultimately successful in that action.

[10] Other jurisdictions adopt the Alberta approach and award a successful litigant a portion of their actual legal fees, but there are diverging approaches as to the appropriate level of compensation to which a successful litigant is entitled. As mentioned, Alberta strives for a general compensation level of 30-50% of actual legal

fees. While the United Kingdom also uses a partial indemnity system, this costs recovery structure generally results in the indemnification of approximately 70-80% of a successful party's actual legal fees.[1]

[11] As in most civil law countries, Switzerland has a *prima facie* complete cost shifting structure in which successful litigants are awarded all expenses from an opposing party. If the plaintiff is only successful in part of its claim, that party recovers costs in proportion to the value of the successful part of the claim and the defendant is entitled to costs proportionate to the value of the unsuccessful portion of the plaintiff's claim.[2]

Comments from the Legal Community

[12] There was no support for a move to the American "no costs" system; rather, most were in agreement that the present Alberta system of partial indemnity is appropriate. There was a significant divergence in opinion as to what constitutes an appropriate level of compensation. Generally, plaintiffs' lawyers viewed present costs as too high and expressed concern about the "chilling effect" that significant costs could have on meritorious claims. Conversely, defence lawyers suggested that costs were not high enough and should be increased to defeat frivolous claims. Practitioners in smaller judicial centres also expressed concern about the increase in Schedule C, noting that bills of costs often are higher than the average fees charged in these centres.

Position of the Committee

[13] The Committee considered whether the current partial system of awarding counsel fees as costs is appropriate or whether Alberta should move towards a system of either no cost shifting or full indemnity. It was observed that either of these extremes could put access to justice out of reach of ordinary Albertans unless the

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[1] This issue highlights the dangers in looking at systems of costs, (and other areas of civil procedure in isolation) as to do so can result in misinformation about the actual practice. Although costs are not routinely awarded to a successful party, American civil juries tend to add them into damage awards. Likewise, full cost-shifting regimes may not in fact result in the harsh penalty that could occur in Alberta due to systems of litigation insurance (such as in Germany), or the fact that solicitor fees are comparatively low (as in Italy).

[2] Swiss Civil Procedure Code, Article 75.

courts retain significant discretion in the process. Even under the present partial indemnity system settlements often result from a fear of bankruptcy if an action is lost at trial.

[14] There was consensus amongst Committee members that costs consequences are an effective mechanism for controlling litigation and discouraging frivolous claims. The Committee also recognized the importance of facilitating a litigation system that is within reach of the average person. Not all unsuccessful cases are without merit and parties should not be unduly punished for bringing a losing action. However, successful plaintiffs should be entitled to some level of recovery of lawyers' fees, as they were forced to avail themselves of the justice system to claim what is rightfully theirs. Likewise, successful defendants should also be compensated to some degree as they had no choice but to participate in the litigation to defend wrongful allegations.

[15] The Committee is of the view that the most desirable balance of these interests is achieved through a default partial indemnity regime for the recovery of the legal fees component of costs. The Committee also believes that partial indemnity of such costs also provides an appropriate incentive to reach settlements early in the action.

[16] The Committee does not favour the Swiss system of awarding each party costs in proportion to the success of the party's claim, which operates in the context of a full indemnity system, while Alberta has a partial indemnity system proportionate to the value of a judgment. However, the degree of success of any party should be included as a factor for the court to consider in awarding costs. Rule 601 already enables the court to consider the results in a proceeding, including the amounts claimed and the amounts recovered.

ISSUE No. 3
Should disbursements incurred before commencement of an action ever be taxable, and, if so, what should be the criteria?

[17] Rule 600(1) provides a definition, or partial definition, of "costs" for the purposes of the costs rules. The opening part of the definition is "costs" includes all the reasonable and proper expenses which any party has paid or become liable to pay

for the purpose of carrying on or appearing as party to any proceeding." Two recent Queen's Bench decisions,[3] and one earlier Appellate Division decision,[4] have held that pre-commencement disbursements cannot be recovered as costs. In *Wortz*, the decision disallowed a municipality's audit costs which had been incurred before action in order to establish a cause of action against a former employee. In *Kha*, the decision disallowed interpreters costs incurred before action in order to enable a party to consult a lawyer. In *Mallott*, the decision disallowed the costs of a pre-commencement re-enactment of a motor vehicle accident which the judge characterized as "necessary and reasonable". Both of the Queen's Bench decisions suggest that the result is unfair.

[18] Given these decisions, comment is requested as to whether disbursements incurred before commencement of an action should ever be taxable, and, if so, under what circumstances and according to what criteria. It should be noted that, if the taxing officer is to have jurisdiction, it will be necessary to make special provision in the taxation rules.

ISSUE No. 4
How should counsel fees be determined for party and party costs?

[19] Alberta relies on a "tariff system" to calculate the fee portion of litigation costs in the form of Schedule C. Schedule C itemizes steps in a litigation action and assigns a fee value for each step. The values increase as does the amount at stake in the litigation: there are five columns based on the quantum of damages sought and the amount of the fee items increase with each column. Costs for any specific step may be determined by reference to Schedule C, or costs may be calculated at the conclusion of an action through preparation of a "Bill of Costs" that sets out the column number relied on and enumerates the specific items for which fees are sought. Disbursements (actual out of pocket costs that were incurred during the litigation for items such as photocopying, expert reports, etc.) are normally awarded over and above the fees set out in Schedule C.

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[3] *Kha v. Salhab* (2001), 282 A.R. 324 (Q.B.); *Millott (Estate) v. Reinhard* (2002), 322 A.R. 307 (Q.B.).

[4] *Bow Island (Municipal District) v. Wortz*, [1921] 2 W.W.R. 153 (Alta. App. Div.).

Costs Regimes in Other Jurisdictions

[20] A tariff such as that used in Alberta is not the only method for awarding costs based on a partial indemnity of actual legal costs. British Columbia also uses a tariff, but its structure is quite different:

> Instead of a fixed tariff with columns for different sizes of actions, the revised rules (Appendix B) use 5 scales (from scale 1: "for matters of little difficulty", to scale 5: "for matters of unusual difficulty or importance"). Each scale prescribes a dollar amount per "unit" [scale 1: $40 per unit,[5] scale 5: $120 per unit]. The Tariff lists various activities in the conduct of an action, and allows either a certain number of units per item, or a range of units per item. For some items the range is from 1-20; for others it is 1-3.
>
> ...
>
> There are two levels of discretion that determine the amount of costs. First, the court sets the scale based on its determination of the importance or difficulty of the action. ... After that, the registrar assesses whatever fees are reasonable within the ranges of units provided in the tariff.[6]

While the British Columbia system is more flexible than Alberta's Schedule C, it is arguably more complicated.

[21] The recently revised *Federal Court Rules, 1998* [Federal] have implemented a system similar to that in British Columbia, 'Tariff B'. It uses five columns which represent the complexity of the action, and there is a range of "units" within each column for each step of the action.

[22] Ontario has a new form of tariff that is quite different from the other tariffs and schedules. It uses two factors to assess fees: the seniority of counsel (for steps that do not require court appearances); and the time which specific applications or trials take. The Ontario Rules require the court to fix costs based on this scale at the conclusion of each motion as well as at trial.

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[5] These amounts reflects amendments effective July 1, 1998.

[6] Eric T. Spink, *Party and Party Costs* (October 1995) [unpublished] at 45-46 [Spink Paper]. This was a background paper prepared for Schedule C Committee to assist in the consequential 1998 amendments to Schedule C. Portions have been deleted in accordance with amendments made to Appendix B in 1992 that repealed the court's jurisdiction to award increased costs (B.C. Reg. 20/2002).

[23] New Brunswick and Nova Scotia take yet another approach to party and party costs: New Brunswick and Nova Scotia are examples of an alternative to the block tariff approach of our schedule C. Their Tariff A[7] contains no itemized list of steps in the proceedings. Instead, it is a simple chart awarding a lump sum as costs for a particular 'amount involved'. The 'amount involved' is defined by the damages award, but it also considers the importance and complexity of the case.[8] The court has a choice of 5 lump sums per amount involved based on Scales 1-5. Scale 3 is the default or basic scale while Scales 1, 2, 4, and 5 award 60%, 80%, 120%, 140% of Scale 3 respectively. For example, if the 'amount involved' is $25,000, the basic costs (Scale 3) will be $3,000, while costs under Scale 1 and 5 would be $1,800 and $4,200 respectively. The court chooses the appropriate scale by considering many factors including the conduct of the parties and the complexity of the issues.[9]

[24] Apparently, Scale 3 was intended to represent about 40% of the solicitor-client bill in an average case.[10] It may actually be lower than that.[11]

[25] Tariff A applies when a matter goes to trial and a decision is made, but both New Brunswick and Nova Scotia have other tariffs for cases where a default judgment is rendered (Tariff B), where a case settles (Tariff C—this tariff has an itemized list of procedural steps), and for disbursements (Tariff D). The advantages of Tariff A are that it eliminates solicitor time in preparing and taxing bills of costs, expedites the closing of files, and allows a more accurate prediction for the client of what a costs award may be.[12] It is also claimed that the tariff recognizes inflation sufficiently well

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[7] Nova Scotia adopted the exact tariff exactly from New Brunswick in 1989.

[8] It is possible for the parties to come to an agreement for the 'amount involved'- *Rules of Court of New Brunswick*, r. 59.09 [New Brunswick].

[9] *Nova Scotia Civil Procedure Rules*, r. 63.04(2); New Brunswick, r. 59.02.

[10] The Honourable Ronald C. Stevenson, "Party-and-Party Costs: The New Approach" (1993) 14 Adv. Q. 129 at 132. No justification is given for choosing 40%.

[11] Using the figures from Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995), Table 3 at 144, the tariff only provides about 10% indemnity, but that assumes that legal fees in the Maritimes are just as high as in Ontario.

[12] Stevenson, *supra* note 10 at 138.

that Nova Scotia adopted it seven years after New Brunswick without any changes in the numbers.[13]

[26] New costs provisions were introduced in the United Kingdom's reformed *Civil Procedure Rules*.[14] Generally, an unsuccessful party will be ordered to pay the costs of the successful party, but the court has complete discretion to make a different order. The method of assessing costs requires counsel to submit their actual bills (and the bills of the solicitors) to the court, which will then use its discretion to assess costs (referred to as the "summary procedure"). If the costs order is not by consent, the court must ensure that the final amount is neither disproportionate nor unreasonable in the circumstances. The court must have regard to all circumstances when awarding costs, including: the conduct of the parties; whether a party has been partially successful; and whether there have been formal and admissible offers to settle. Costs may not exceed full indemnity. There is a separate fee schedule for fast track cases which caps the amount of costs for matters on the fast track, varying by the amount of the claim though there are detailed rules governing how the court may vary these amounts. Fixed costs apply to certain situations such as default judgments and summary judgments that vary depending on the amount in issue and the number of steps taken to that point.

Observations about the Different Systems

[27] While an accepted method of calculating costs, all types of tariff systems are subject to criticisms:

> Fixed tariffs may be obsolete. It is extremely difficult to keep them current under any circumstances, especially if long periods elapse between revisions. There are difficult political issues to be faced every time a tariff comes up for revision, which may inhibit the process. When tariffs also governed or influenced solicitor and own client fees, there was at least some incentive to keep them current, but as fees became disconnected from the tariffs, the fixed tariffs have languished to the point where most are vestigial.
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> Many jurisdictions have switched over to more flexible tariffs like those used in B.C. and by the Federal Court. But it is questionable whether even these tariffs are functional. The purpose of more flexible tariffs should be to produce consistent partial indemnity having regard to

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[13] Spink Paper, *supra* note 6 at 40-41.

[14] United Kingdom, *Civil Procedure Rules, 1998*, No. 3132 L. 17, r. 44.

> the amount, complexity, importance, etc. of the claim, and inflation. The B.C. experience suggests that a flexible tariff may still fail to produce such consistency.
>
> Perhaps the tariffs are an overly complicated method of trying to keep harmony between party and party costs and the successful litigant's actual costs. It might be simpler, and more consistent, to award a certain percentage of solicitor and client costs. The high cost of litigation gives parties a powerful incentive to fight over costs, especially with higher levels of indemnity, and it is particularly difficult to determine what the proper costs are when the only guideline available is the tariff. If a tariff is used, a clear statement of what the tariff is intended to produce (as a percentage of reasonable solicitor and client costs) would provide some valuable guidance for dealing with disputes over costs.
>
> It has been suggested that linking party and party costs to reasonable solicitor and client costs would place increased pressure on taxing officers. That is probably true, but it may also be unavoidable, and preferable to having disputes over costs placed before the court.[15]

[28] The new Ontario Rules rely more on what "reasonable" fees should be, but this approach is not without problems. Seniority of counsel seems a strange basis on which to award fees as it renders irrelevant the complexity of the issues or the skills exercised by counsel. This system acts to the detriment of parties who engage talented junior lawyers or who come up against senior practitioners. Parties should not be required to pay more merely because of their opponent's choice of counsel. Situations may also arise where the availability of higher costs gives incentive to senior counsel to attend relatively simple applications that junior counsel are capable of handling.

[29] We have received anecdotal evidence from English practitioners that under the new U.K. *Civil Procedure Rules* a successful litigant generally receives about 70-80% of actual legal fees. They also noted that the revised manner of calculating costs has created a specialized business in drafting legal bills to submit to the court. Although matters may settle on their merits, it has become common to see significant spin-off litigation over costs which is costly in and of itself.

POSITION OF THE COMMITTEE

[30] Having examined other systems for awarding party-party costs, the Committee prefers to retain a tariff similar to that used in Schedule C. The general consensus of

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[15] Eric T. Spink, *Party and Party Costs: Executive Summary* (February 26, 1996) at 13 [unpublished] [Spink Executive Summary].

the Committee was that the present system, while not perfect, provides a sort of "rough justice". This form of tariff provides certainty, a reasonable level of indemnity, and can be employed with relative ease. Certainty in the area of costs assists parties in deciding whether to continue the action or reach a settlement. If the tariff is inappropriate the court may assess appropriate costs.

[31] Contrary to the principles that the Committee views as integral to our system of costs, the British Columbia, Federal Court and British systems appear to be labour intensive, complicated, expensive and time consuming. The Committee is of the view that on balance, a fixed tariff best reflects the principles that underlie the view of costs in Alberta and minimizes the problems encountered in other systems.

[32] This Consultation Memorandum does not address the appropriate amounts to be shown in Schedule C or its successor for specific services. That is a topic that is beyond the scope of the Rules of Court Project.

B. Specific Issues

ISSUE No. 5
What should be the relationship between a tariff and court discretion? How should the court exercise judicial discretion in awarding party-party costs under a fixed tariff?

[33] Rule 601 expressly provides that costs are always in the discretion of the court and indicates that the Schedule C is merely a guideline to which the court may or may not refer. Rule 601(1) and (2) include a list of factors for the court to take into account in deciding whether to award costs, as well as several options as to how costs may be awarded.

[34] The primary argument against unfettered judicial discretion is uncertainty. It is expensive and time consuming to argue over costs. Limiting judicial discretion in this area provides a level of certainty that, in theory, should minimize disputes arising from the calculation of costs in an action.

POSITION OF THE COMMITTEE

[35] Overall, the Committee believes that judicial discretion is very important and should be maintained in the area of costs to some extent. There was also a consensus that factors guiding judicial discretion currently in Rule 601 should also be retained to assist the court in assessing costs. As discussed above in the section on the Swiss system of costs, an additional factor that should be included is whether it is appropriate to apportion costs based on the extent of success of a party's claim or defence.

[36] The Committee was divided as to the extent to which the court's discretion should extend and it seeks the legal profession's views as to how the court should exercise its discretion in matters of costs, and whether the listed factors guide the exercise of the discretion.

ISSUE No. 6
Should there be a mechanism in the tariff to adjust the amounts to account for inflation?

[37] As noted above, a significant problem encountered with a fixed tariff for counsel fees for party and party costs, such as Schedule C, is that the amounts therein become dated rather quickly due to the passage of time and inflation. If the intent of the Schedule in the first instance is to reimburse a successful litigant for an approximate portion of legal fees, this intent is defeated as time goes by if the fee items are not periodically adjusted.

[38] Schedule C has been revised five times since 1914: in 1944, 1951, 1966, 1984 and 1998. The tariff amounts have increased dramatically, and tariff items have been added or dropped to reflect changes in practice. There is no data that allows us to reliably compare the level of indemnity provided by Schedule C over the years, but it is clear that the proportionate indemnity provided by the tariff has dropped substantially since 1914.

[39] There is no easy answer to the question of how to keep fee amounts in set schedules current such that they result in the proportional indemnity originally intended:

> Inflation is an important factor, but it is extremely difficult to measure. A general measurement of inflation like the Consumer Price Index ("CPI") does not accurately reflect inflation of the cost of litigation. Litigation costs have apparently increased much faster than the CPI. The increase in litigation costs is partly due to general inflation, but a significant proportion of the increase is perceived to be due to the growing complexity of the litigation process and more adversarial use of procedure.[16]

[40] A specific issue raised in consultation involving judicial discretion is the use of multiples of Schedule C columns. Rule 601(2)(d)(i) provides that the court may award multiples of columns of Schedule C. This practice developed from the fact that the "old" Schedule C amounts were outdated and did not provide a reasonable measure of compensation to a party to whom costs were awarded.[17] Multiples of 1.4 to 1.5 times the appropriate column were commonly imposed in the 1990s to compensate for inflation that was not reflected in the Schedule C amounts.[18] It appears that since Schedule C was revised in 1998, the court is less likely to award multiples of columns in Schedule C merely to compensate for inflation as the fee amounts are more reflective of the current costs of litigation. However, as time passes it is likely that parties will once again seek multiples of columns as the items become outdated, which lends itself to uncertainty, inconsistency and more litigation.

Approaches in Other Jurisdictions

[41] As discussed above, the recently revised Federal Rules have implemented a system based on five columns which represent the complexity of the action with a range of "units" within each column for each step of the action. The unit value is set each year and increases based on a formula which takes the Consumer Price Index

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[16] Spink Executive Summary, *ibid.* at 11.

[17] *Caterpillar Tractor Co. v. Miller (Ed) Sales & Rentals Ltd.* (1998), 216 A.R. 304 at 306 (C.A.).

[18] *Claudio's Restaurant Group Inc. v. Calgary (City)* (1993),147 A.R. 355 (Q.B.); *Mackie v. Wolfe* (1994), 159 A.R. 148 (Q.B.); *Bohus v. Williams* (1996), 188 A.R. 79 (Q.B.); *Garrido v. Pui* (1998), 222 A.R. 248 (Q.B.).

into account. Presumably this is intended to account for inflation to ensure that the costs amounts do not become outdated.

[42] The Australian Law Review Commission has recommended, *inter alia*, that event based fee scales (similar to Schedule C) should be introduced in all federal jurisdictions. It further recommended that a federal costs advisory committee should undertake a continuing revision of the amounts in the fee scales to ensure that the fee scales are current and appropriate. In addition to an annual review in accordance with the consumer price index, a triennial review of the scale amounts and categories was recommended to ensure the currency and effectiveness of the scales.[19]

POSITION OF THE COMMITTEE

[43] The Committee considered the feasibility of imposing a system of updates to the fixed tariff. Some of the options discussed included calculations similar to the *Judgment Interest Act* or requiring periodic reviews on a regular basis. One concern the Committee has is that while costs are usually addressed at the end of an action, the various steps are taken over the course of the action. Applying the same inflationary factor for each step may not be appropriate if the action takes place over a significant period of time, but it can be difficult and time consuming to apply different inflationary factors to each step in an action.

[44] After considering the various options to dealing with the impact of inflation on Schedule C, including: tying Schedule C to the inflationary factors set out in the *Judgment Interest Act*; amending Schedule C annually to reflect inflation; setting an annual inflationary factor by Regulation; or leaving inflation in the discretion of the courts, the Committee was unable to arrive at a consensus of whether, or how, inflation should be taken into account in Schedule C. The Committee seeks input from the legal profession to guide its recommendation.

ISSUE No. 7
Should a party be entitled to more than full indemnification pursuant to single tariff costs?

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[19] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89) (Sydney : Australian Law Reform Commission, 2000).

[45] Under Rule 600(1), "costs," for the purposes of Rules 601 to 612, which are the rules dealing with party-party costs, "includes all the reasonable and proper expenses which any party has paid or become liable to pay" in connection with litigation. While it uses the word "includes," there is no reason to think that provisions for awarding "costs" in these rules permits the recovery of anything but expenses actually incurred. However, this limitation is generally overlooked, and the prevailing view is that The Rules themselves do not prohibit a party from recovering more than their actual legal fees under Schedule C. (This discussion does not apply to the issue of over-indemnification under the compromise rules which will be dealt with in Chapter 7.)

[46] Prior to the 1998 changes to Schedule C, the issue of over indemnification rarely, if ever, arose. As the fees in Schedule C were insignificant, bills of costs were consistently less than actual lawyer fees. The increased amounts in Schedule C have created situations where an award of costs to a successful party can actually exceed full indemnification. Full indemnification absent special circumstances is contrary to the philosophy underlying the partial indemnity system, and greater than full indemnification is more so.

[47] The issue of over-indemnification under Schedule C was discussed in *Shillingford v. Dalbridge Group Inc.*[20] The following observations about costs were made:

(i) party and party costs are traditionally meant to partially indemnify a successful party for legal costs associated with the action;
(ii) costs on a party and party basis generally strike a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser;
(iii) one must be cautious in departing from the general rule that costs are to be taxed as between party and party on the basis of an authoritative tariff;
(iv) complete indemnification for costs should be reserved for exceptional cases;
(v) absent a direction from the court to the contrary, the taxing officer should only allow an over-indemnification where the rules with respect to an offer of settlement apply.

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[20] (2000), 268 A.R. 324, 2000 ABQB 28 [Shillingford].

[48] The court examined a long line of cases standing for the proposition that standard party-party costs should not result in over-indemnification. The Court's conclusion was that if there is evidence that standard party-party costs under Schedule C would result in over-indemnification, fees should be taxed down accordingly.

[49] Another situation in which over-indemnification can result from the imposition of single Schedule C fees is where a party is represented *pro bono* or *pro se*. Such was the case in *O'Leary v. MacLeod*,[21] where the successful party was represented by Calgary Legal Guidance at no charge. It was argued that only limited costs should be awarded, as Schedule C costs would result in over-indemnification. The Master, referring to *Shillingford*, held that the successful party should not be denied costs simply because the lawyer was from Calgary Legal Guidance, notwithstanding that over-indemnification may occur.[22]

POSITION OF THE COMMITTEE

[50] The Committee recognized that over-indemnification is a real possibility under the present Schedule C, and this situation would likely exist under any fixed tariff with significant fees. There were differing opinions as to whether the rules should limit costs recovery to full indemnification (in the absence of a formal offer or punitive costs for misbehaviour). It was noted that the possibility of receiving full tariff costs could encourage lawyers to take on *pro bono* work that would allow litigants more access to good counsel.[23] In other cases it may be unjust to allow a party to be over-indemnified. Some members of the Committee preferred a policy that favoured certainty and consistency of treatment in costs awards that would result from a policy limiting recovery to full indemnification.

[51] The Committee did not reach a consensus on whether litigants should be entitled to more than full indemnification from single party costs and seeks input from the legal community on this issue.

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[21] (2001), 287 A.R. 43, 2001 ABQB 239 (Master).

[22] The decision suggests that the Master was not impressed with the conduct of the unsuccessful party which may have been a factor in this award, though this is not stated expressly.

[23] The question of self-represented parties will be dealt with separately.

ISSUE No. 8

- **Should the costs of an interlocutory motion be payable by the unsuccessful party forthwith in any event of the cause?**
- **Should *ex parte* motions be excepted?**

[52] Formerly The Rules provided that costs incurred throughout an action were to be "in the cause" unless otherwise ordered; thus, the costs awarded to a party who was successful in an action might include costs of an application on which that party was unsuccessful. Subsequent amendments to the rules now provide that unless otherwise ordered, a party who is successful on an application is entitled to costs in any event of the cause, and that such costs are payable forthwith rather than at the end of the action.[24]

[53] There is some indication that the genesis of this change emanated from the Edmonton Bar, as there was a perception that it was unfair for a party to wait until the completion of trial to receive costs of successful interlocutory applications. There was also a feeling that having costs payable forthwith and in any event of the cause would eliminate frivolous or unnecessary interim applications.

Rules in Other Jurisdictions

[54] The rules in other jurisdictions vary widely as to the default rule concerning costs of interlocutory applications. The different approaches include:

(i) unless otherwise ordered, costs are payable forthwith, or forthwith after an assessment if the amount is not set or agreed upon;[25]

(ii) costs in the cause unless otherwise ordered;[26]

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[24] See rr. 601(3) and 607. R. 607 was amended effective January 1, 1998 to provide that costs were to go to a successful applicant in any event of the cause (Alta. Reg. 269/1997, s. 14). On June 26, 2000 costs became payable forthwith (Alta. Reg. 152/2000, s. 11). Costs "in any event of the cause"go to the party that is successful at that specific application, regardless of the ultimate outcome of the action.

[25] Manitoba, *Court of Queen's Bench Rules*; Prince Edward Island, *Rules of Civil Procedure*, r. 57.03 [Prince Edward Island]; New Brunswick, r. 59.03.

[26] *Supreme Court of the Northwest Territories*, r. 649 [Northwest Territories]; *Saskatchewan Queen's Bench Rules*, r. 550 [Saskatchewan].

(iii) for opposed motions a successful party receives costs in the cause; unopposed motions result in costs in the cause;[27] for other matters costs follow the event unless otherwise ordered;[28] or

(iv) standard costs in the cause.[29]

[55] Recently Ontario amended its Rules to provide that costs must be fixed at the time of the application, except in exceptional circumstances.[30] Costs are set in accordance with the tariff and are to be paid within 30 days "unless the court is satisfied that a different order would be just". In exceptional circumstances the court may order an assessment, but the costs must be paid within 30 days of the assessment.[31] The intent of amending the Ontario Rules to have costs payable forthwith in any event of the cause was to deter frivolous motions and have litigants think twice before bringing motions.[32] It was felt that the practice of deferring costs until trial (in the cause) led to people bringing motions without fear of paying the costs, since most matters settled prior to trial and thus the costs of the lost motion were forgotten.

Comments from the Legal Community

[56] The opinions of the legal community varied on the question of whether the default rule should be that interlocutory costs are payable forthwith in any event of the cause. While the majority preferred the present system of costs payable forthwith, there were contrary views that having costs payable forthwith as the default rule can work a hardship on parties who bring meritorious, though ultimately unsuccessful, applications. Another comment was that while the concept of having "costs payable forthwith" is good in theory, it is rarely enforced and is thus of little practical use.

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[27] British Columbia, *Supreme Court Rules*, r. 57(12) [British Columbia].

[28] British Columbia, r. 57(9).

[29] Saskatchewan, r. 550.

[30] Ontario, *Rules of Civil Procedure*, r. 57.01(3), amended effective January 1, 2002 [Ontario].

[31] Ontario, r. 57.03(1).

[32] Drew Hasselback, "New rule aims to curb frivolous litigation," *National Post* (6 March 2002) FP10.

There was also concern that having costs payable forthwith has created acrimony between, and results in injustice to, parties litigating in smaller centres.

POSITION OF THE COMMITTEE

[57] The Committee's opinion is that the present default rule that costs of interlocutory motions be payable forthwith in any event of the cause deters frivolous and unnecessary applications. Another view expressed was that this rule encourages consent orders and compliance with orders that have already been made. The Committee recognized the concern that costs payable forthwith could discourage meritorious applications by impecunious parties. There is an additional concern that this requirement may encourage parties with "deep pockets" to bring motions as they may win costs if successful. As they do not have difficulty meeting a "costs payable forthwith" order if they are unsuccessful there is little deterrent effect. However, as costs are always subject to the discretion of the court, the general consensus was that the current rule that costs be payable forthwith in any event of the cause should be retained, subject to an order otherwise.

[58] A related issue concerns the express provision in Rule 607 that the costs of all motions, including *ex parte* motions, should be paid in any event of the cause and forthwith. This rule seems to make little sense in the context of *ex parte* motions, particularly with such motions such as substitutional service orders or service *ex juris* orders where a defendant may not even know that an action has been commenced and has no opportunity to respond to the motion or make submissions as to costs.

[59] Ontario, Manitoba, Prince Edward Island and Saskatchewan specifically provide that there shall be no costs of *ex parte* motions. In British Columbia unopposed motions attract costs in the cause.

POSITION OF THE COMMITTEE

[60] The Committee's opinion is that *ex parte* orders should specifically be excluded from the requirement that costs be payable forthwith in any event of the cause. If a party seeks costs of the *ex parte* order, that party may ask that the *ex parte* order stipulate that costs will be addressed by all parties at a future time.

ISSUE No. 9

Should the structure of the present Schedule C be retained?

(i) Are items divided in an appropriate manner?

(ii) Are the columns appropriate?

(iii) Should other items be included?

Specific Issues under Issue 9

(i) Are items divided in an appropriate manner?

[61] Under the previous Schedule C, taxing officers were rarely called on to reduce the fees for specific costs items, because the schedule was more itemized. Significant changes were made to the number of items included in Schedule C when it was amended in 1998. The number of items was reduced from 55 to 22 and in many instances steps were consolidated. For example, under the former Schedule C each pleading was a separate block, while under the present Schedule all pleadings are grouped together and a lump sum for all is contemplated. An issue created by this change is whether it is appropriate to award the full amount for an item where there was actually little work or effort involved in that particular step, such as parties that file only a Statement of Claim versus a party that has filed Third Party Notices.

POSITION OF THE COMMITTEE

[62] Having taken into account the issues raised by the 1998 consolidation of different steps in Schedule C, the Committee is of the view that while most of the items in Schedule C are adequate in their current form, some items should be separated into individual categories. Pleadings should be broken down into specific documents, including issuing Statements of Claim or Originating Notices, Statement of Defences, Counterclaims, Replies and Third/Fourth party notices.

(ii) Are the columns appropriate?

[63] The recent revisions to Schedule C reduced the number of columns from six to five and revised the divisions of the monetary amounts therein. During consultations some suggested that Schedule C should specifically address higher amounts through more columns.

[64] One must also consider that in many large, complex cases, Schedule C (or any fixed tariff) does not, and perhaps cannot, provide an appropriate level of

compensation.[33] In response to this, pursuant to Rule 601(2)(d)(i) multiples of Schedule C columns have been used to assess costs when an action is of considerable magnitude and complexity.[34]

POSITION OF THE COMMITTEE

[65] The Committee was of the view that the present column amounts are adequate. The Committee recognizes that fixed tariffs may not be adequate for many complicated larger actions and in those cases the court must have jurisdiction to devise case-appropriate methods for assessing costs. The Committee also seeks the legal profession's views as to whether the use of multiple column amounts should be addressed specifically in the rules.

(iii) Should other items be included

a. Judicial dispute resolution

[66] During consultations the question of whether there should be a JDR item in the fixed tariff was raised. JDRs are frequently used but are currently not addressed in Schedule C.[35]

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[33] See *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1999), 251 A.R. 101, 1999 ABQB 801 [*Trizec Equities*] and *LSI Logic Corp. of Canada, Inc. v. Logani* (2001), 100 Alta. L.R. (3d) 49 (Q.B.) [*LSI Logic*].

[34] *Dix v. Canada (Attorney General)* (2002), 315 A.R. 139, 2002 ABQB 768 (legal and factual complexity of action justified 2x Column 4); *Ritter v. Hoag* (2003), 334 A.R. 290, 2003 ABQB 229 (used 2x Column 5 to calculate security for costs of $40 million claim, but recognized that costs in the discretion of trial judge); *Trizec Equities, ibid.*(court refused to award multiple noting that multipliers do not work for complex litigation and it was preferable to award a percentage of indemnity costs); *LSI Logic, ibid.* (court preferred a percentage of actual indemnity noting that Schedule C is woefully inadequate for party-party costs due to complexity and amount of work); *Pettipas v. Klingbeil* (2000), 260 A.R. 1, 2000 ABQB 378 (as there was nothing out of ordinary to justify multiplier it was denied); *HSBC Bank Canada v. Serval Corp.* (2000), 261 A.R. 181, 2000 ABCA 169 (though millions involved, appeal not complicated, multiplier denied). As discussed previously, multiples of Schedule C columns have been used to compensate for inflation. See *supra* note 18. Multiples have also been imposed as a penalty for malfeasance either during the action or in the events which give rise to the action; See *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (1999), 242 A.R. 179 (Q.B.); *Interclaim Holdings v. Down*, 2000 ABQB 176 (allegations of fraud, no multiple awarded but reserved issue of multiples of costs to trial judge); *Stevens v. Crawford* (2000), 264 A.R. 219, 2000 ABQB 305 (unfounded allegations of undue influence, awarded 2x Column 5); *Coe v. Sturgeon General Hospital District No. 100* (2001), 96 Alta. L.R. (3d) 203, 2001 ABQB 658 (conduct deserving of some sanction, but not exceptional enough to award solicitor-client costs, awarded 1.5x Column 5); *Cobrico Developments Inc. v. Tucker Industries Inc.*, 2000 ABQB 817 (multiplier denied as there was no real misconduct; no need to impose costs as a deterrent).

[35] Costs of JDRs are usually only awarded in cases where a party has engaged in been bad faith or

(continued...)

[67] In *Beenham v. Rigel Oil & Gas Ltd.*[36] it was held that costs of JDRs should not be awarded as a matter of policy. Awarding costs of JDRs may have a chilling effect on a party's willingness to participate in JDRs which is contrary to the purpose of JDRs, being to encourage pre-trial settlement efforts.

[68] While current Alberta practice is not to award costs for JDRs, the general rule remains that costs follow the event. Consequently, costs may be awarded for steps up to the JDR. One wonders how technically an imposition of costs for a JDR would work, as this would require a determination of who is the "winner" or "loser" in the JDR. Arguably this is contrary to the spirit and intent of the JDR procedure.

Comments from the Legal Community

[69] There was mixed opinion as to whether JDRs should be included as an item in the fixed tariff. Some suggested that as a significant amount of work is required to prepare for JDRs they should be included as a fee item, though others disagreed.

[70] Generally, members of the court do not favour costs of a JDR, as they wish to have parties voluntarily utilize this service. As JDRs have proven to be very successful, they do not wish to deter parties with a threat of costs in the event of an unsuccessful JDR.

[71] The Early Dispute Resolution Committee's view is that cost rules based on the success or failure of the settlement procedure are inappropriate. Non-attendance and inappropriate behaviour by counsel or the litigant are the main items to consider. A different scenario may result if JDR is mandatory; sanctions for failure to comply with the terms of an order to attend a JDR would likely be necessary if participation in a JDR is required. Sanctions may also play a limited role in preventing abuses in a voluntary JDR. For example, a lawyer may proceed to JDR with no intention to settle but merely as a "look see." Unfortunately, such a situation cannot always be identified for costs purposes.

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[35] (...continued)
misbehaviour.

[36] (1998), 240 A.R. 122 (Q.B.).

Rules in Other Jurisdictions

[72] In Saskatchewan and Ontario a pre-trial conference judge may make an order for costs of the pre-trial conference that is essentially a settlement meeting, otherwise, costs are costs in the cause.[37] The Northwest Territories has a similar provision for case management conferences.[38] Other provinces only award costs for settlement steps if there has been some sort of malfeasance on behalf of a party. In Prince Edward Island costs are awarded against any party who fails to file and serve a pre-trial conference memorandum within the prescribed time.[39] Those costs must be paid before that party can file any further documents or take any further steps in the action. Newfoundland imposes costs for failure to attend or where counsel is not prepared or authorized to deal with the matters contemplated.

POSITION OF THE COMMITTEE

[73] The Committee views JDRs as an important innovation in Alberta's litigation process. While the Committee recognizes that counsel engage in extensive preparation for JDRs, it was of the opinion that JDRs should not be included as an item in the fixed tariff. The Committee was concerned about the possible chilling effect that set costs could have on the desirability and effectiveness of JDRs. The Committee was of the view that it could remain open to a trial judge to order costs in the case of egregious behaviour or bad faith on the part of one party, if so advised by the JDR judge.

b. Discovery

[74] It has been suggested that a fixed tariff should include some specific steps in an action that are particularly labour intensive. These steps include preparing for examination for discovery and examination of the records received from other parties.

POSITION OF THE COMMITTEE

[75] The Committee agrees that the fixed tariff should specifically address steps in the discovery process. In addition to the current fee for preparing an affidavit of

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[37] Saskatchewan, r. 191(16)(c); Ontario, r. 50.06.

[38] Northwest Territories, r. 286.

[39] Prince Edward Island, r. 50.01(3).

records, there should be a specific item addressing review of the other party's records. There should also be a fee for preparing for Examination for Discovery, but this fee should be awarded only once, regardless of the number of witnesses or the number of adjournments of the discovery.

c. Abandoned motions

[76] The Committee considered whether or not a costs item should be provided for cases in which

- a party is forced to bring an application to get the opposite party to take a step to move the case forward, and
- as a result of the application, the opposite party takes the step or a consent order is made, so that the first party abandons the motion.

The question is whether, in these circumstances, a costs item should be provided for the first party despite the abandonment of the application: the first party has been put to the trouble and expense of preparing and filing a notice of motion and affidavit and preparing for the motion.

POSITION OF THE COMMITTEE

[77] The Committee is of the view that some costs should be made available to the party who has been forced to commence an application in order to get the opposite party to move forward.

[78] The Committee puts forward for discussion, and invites comment upon, the following proposal: a fee item should be provided which would provide for costs as follows:

- 15% of the Schedule C item for a contested application for preparing and filing the notice of motion;
- an additional 35% of the Schedule C item for preparing and filing an affidavit in support of the motion;
- an additional 40% of the item for attendance on the application.

d. Summary trials

[79] There is no specific fee item in Schedule C for Summary Trials, and the Committee considered whether such an item should be added to Schedule C.

[80] Queen's Bench Practice Note 8 deals with the subject as follows:

> 14. Schedule "C" does not specifically reference Summary Trials. However, items 10 (modified as appropriate in regard to footnote 2 thereof) and 11 would appear adequate in accordance with the Court's discretion on costs. Note that the fees in item 11 are identical (except for 2nd counsel fees) to item 8 for special chambers.

POSITION OF THE COMMITTEE

[81] The Committee agrees that the trial aspect of Summary Trials is really sufficiently covered by items 10 and 11 of Schedule C. However, there were comments from the legal community indicating that judges felt uncomfortable awarding such costs, such that the Committee suggests that there should be a footnote to items 10 and 11 indicating that summary trials should be claimed under these items.

e. Interlocutory appeals to the Court of Appeal

[82] It has been suggested that it would be useful to have a specific item in Schedule C dealing with appeals to the Court of Appeal. The items about applications in the Queen's Bench do not apply, and doubt was expressed as to whether item 17, which deals with contested applications before the Court of Appeal, applies.

POSITION OF THE COMMITTEE

[83] The Committee is of the view that item 17 covers appeals from interlocutory applications. However, if necessary the wording of item 17 should be revised so that it will specifically include appeals from interlocutory orders of the Queen's Bench.

f. Settlement

[84] It has been suggested that there should be a fee item for settlement in Schedule C. Settlement discussions, and preparation for settlement negotiations, can be onerous, and it was urged that, particularly in personal injury actions, a settlement fee would be appropriate. On the other hand, as in the case of JDRs, the Committee was concerned about the possible chilling affect that providing a fee item for settlement might have. Also, it is often not possible to say which party was successful in achieving a settlement.

POSITION OF THE COMMITTEE

[85] The prevailing view in the Committee was that no fee item for settlement should be included in Schedule C, but that, given the strength of the differing views involved, the Committee specifically requests comment on the question from the legal community.

g. Goods and services tax

[86] Rules 605(9) and 605(10) deal with the awarding of GST on costs, providing a default position in the absence of a specific order. Rule 605(10), which was last amended in 2003, places an onus on the successful litigant to establish that the litigant will be paying the GST on the costs and will not be reimbursed through tax credits or rebates.[40] It was reported to the Committee that there has not been extensive use of the affidavit required under Rule 605(10) since the subrule was introduced, although it is now being used with increasing frequency.

[87] The Committee reviewed the arguments for and against awarding GST on legal fees as part of a costs order. The foremost argument in favour of awarding GST is that the successful litigant will be charged GST by their lawyer, and thus would be penalized if GST is not added to the costs award. This view relies on the underlying principle that the amount of the costs award intended will be eroded if 7% of the recovery must be paid to the federal government as GST. Ultimately, the level of indemnification intended by the court will be maintained if GST is awarded to the successful party. Provided that a party is required to pay GST, there should be recovery as with any other disbursement.[41]

[88] There are also cogent arguments against awarding GST. Since party-and-party costs are intended only as a partial indemnification of the successful litigant's legal costs, not a complete indemnity, the successful party may be over-indemnified if GST

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[40] This change to the rule incorporates some of the arguments noted below in cases decided before the amendment to the rule.

[41] *Huet v. Lynch*, (2001), 277 A.R. 204, 2001 ABCA 37; *Edmonton Regional Airports Authority v. North West Geomatics Ltd.* (2003), 332 A.R. 299, 2003 ABQB 280 [*Edmonton Airports*]; *MacCabe v. Westlock Roman Catholic Separate School District No. 110* (1999), 70 Alta. L.R. (3d) 1, 1999 ABQB 666; *Ropchan v. Duncan*, [1992] A.J. No. 1031 (Q.B.); *Broda v. Broda*, 2003 ABQB 257; *Pauli v. Ace Ina Insurance* (2003), 15 Alta. L.R. (4th) 282, 2003 ABQB 354; *Wolf Willow Shopping Centre Ltd. v. Inter-Hair Group*, 2003 ABPC 70.

is awarded. Secondly, there are some parties who are entitled under tax laws to a refund or credit for GST, and thus might be overcompensated by an order that GST be paid to them (though this argument is addressed by the requirement of an affidavit that the applicant will actually bear the GST). The third argument is that there are some fee arrangements, such as contingency agreements, that require the client to pay taxable costs to the lawyer which may not require GST to be paid.[42] The argument is that in order to maintain the integrity of such fee arrangements, GST should not be ordered by the court, as it may result in over-indemnification to the successful litigant.

[89] The rules in many other jurisdictions in Canada are silent on the issue of GST, including Ontario, Saskatchewan, Nova Scotia, Manitoba, Newfoundland and Prince Edward Island. Three jurisdictions other than Alberta specifically deal with GST. The British Columbia Rules make the awarding of GST mandatory if the tax is payable by a party in respect of legal services or disbursements.[43] New Brunswick requires an affidavit establishing that GST is payable and that the successful litigant is liable to pay the tax without claiming an input tax credit.[44] And the Northwest Territories Rules allow the party entitled to costs to calculate and add to the bill of costs the GST or "any similar value-added tax imposed by any authority that applies to a solicitor's account."[45]

POSITION OF THE COMMITTEE

[90] The Committee was of the view that a reasonable balance has been reached by the Alberta Rule dealing with GST. Under Rule 605 litigants are entitled to GST with the burden resting on the applicant to provide the affidavit required by Rule 605(10) to show that the GST will actually be borne by the applicant. In the opinion of the

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[42] *Madge v. Meyer* (2000), 259 A.R. 351 (Q.B.), aff'd (2001), 281 A.R. 143 (C.A.); *Peter Pond Holdings Ltd. v. Shragge* (2002), 326 A.R. 44, 2002 ABQB 746; *India (Union) v. Bumper Development Corp.* (1995), 171 A.R. 166 (Q.B.); *Schuttler v. Anderson* (1999), 246 A.R. 17 (Q.B.); *Morrison v. Smithson* (1997), 202 A.R. 194 (Q.B.); *Byron v. Cabrera*, 2003 ABQB 347; *574095 Alberta Ltd. v. Brendanco Investments Inc.* (2002), 319 A.R. 383, 2002 ABQB 487; *Mar Automobile Holdings Ltd. v. Rawlusyk* (2001), 295 A.R. 152 (Q.B.); *WIC Premium Television Ltd. v. General Instrument Corp.* (2001), 315 A.R. 318, 2001 ABQB 1132.

[43] British Columbia, r. 57(8.1).

[44] New Brunswick, r. 59(8.1).

[45] Northwest Territories, r. 648(8).

Committee, the rule offers a degree of certainty and yet maintains some flexibility in GST recovery. No change is necessary to the rule.

ISSUE No. 10
Should a self-represented litigant be entitled to party-party costs?

[91] The principle applied by the courts in several cases[46] is that a self-represented party should not automatically be disentitled to costs. However, it may not be appropriate to award the same level of party and party costs as that which would be awarded to a represented party. This was confirmed by the Court of Appeal in *Dechant* and *Huet v. Lynch*.[47] Generally, the courts have considered that the costs awarded to self-represented parties should be discretionary, seeking an equitable result while balancing the policy objectives of costs orders:

> ...costs under the Rules are still primarily concerned with reimbursement for costs expended and a partial indemnification for legal fees, having regard to value for work. We recognize, however, that costs may include lost opportunity costs of the unrepresented litigant. That said, unrepresented and represented litigants are not in the same position. Schedule C does not provide an automatic basis for determining costs for unrepresented litigants and may also frequently not be appropriate for represented litigants.[48]

[92] The Committee identified a number of objectives in setting costs orders. From a strict costs viewpoint, a default guideline would produce the most certainty. However, that solution may not address the broader issues relating to self-represented litigants.

POSITION OF THE COMMITTEE

[93] The Committee is of the view that a default guideline is one of the options that should be reviewed in the broader discussion of this issue in the Consultation Memorandum No. 12.18, Self-Represented Litigants.

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[46] *C.(A.R.) v. C.(L.L.)* (1999), 256 A.R. 311 (Q.B.); *Shillingford, supra* note 20; *Huet v. Lynch, supra* note 41; *Dechant v. Law Society of Alberta* (2001), 277 A.R. 333 (C.A.) [*Dechant*].

[47] *Ibid.*

[48] *Dechant, ibid.* at para. 20.

ISSUE No. 11
How should costs operate under Rule 605(7) when counsel or a litigant decides to bring an action in Queen's Bench rather than Provincial Court?

[94] Rule 605(7) is as follows:

> Notwithstanding anything in this Rule, unless otherwise ordered
>
> (a) in the case of an action commenced in the Court of Queen's Bench when the amount sued for or the amount of the judgment does not exceed the amount for which the Provincial Court has jurisdiction under section 9.6 of the *Provincial Court Act*, the costs to and including judgment shall be taxed in the amount of 75% of that provided for under Column 1 of Schedule C;
>
> (b) in respect of subrule (a), post judgment matters shall be taxed in the amount of 100% of that provided for under Column 1 of Schedule C.

Subrule 8 provides that subrule 7 only applies in respect of actions the subject-matter of which is within the jurisdiction of the Provincial Court.

[95] Rule 605(7) appears to be designed to encourage litigants to go to Provincial Court with matters which are within the newly expanded monetary jurisdiction of the Provincial Court (matters under $25,000). Since the limit is still fairly new, it was difficult to say whether or not there has been an impact, or whether the impact is still to come. One concern was that some debt cases seem to be brought in Court of Queen's Bench simply to obtain a higher costs judgment, and that in some of these cases the costs portion of the judgment can exceed the debt. If so, Rule 605(7) is achieving its objective. However, a different view expressed in our consultations with the legal community is that it is not cost effective to have legal counsel in Provincial Court as the costs recovery is so low, yet some issues might require legal arguments.

POSITION OF THE COMMITTEE

[96] The Committee asks the legal profession for comments on this issue.

CHAPTER 2. TAXATION

A. General Matters

ISSUE No. 12
Should the term "assessment" and related terms be substituted in The Rules for "taxation" and related terms?

[97] The term "taxation" and related terms such as "taxing officer" are well understood by lawyers, but they are not user-friendly for others, particularly self-represented litigants and clients who might want to use the taxation procedure if they were aware of it.

POSITION OF THE COMMITTEE

[98] The Committee is of the view that "assessment," "assessment officer," and related terms should be substituted in the rules for "taxation," "taxing officer" and related terms. However, the current terms will be used in the following discussion.

ISSUE No. 13
Is the general organization of the taxation rules appropriate?

[99] Some rules about taxation apply only to party-party taxations, e.g., Rules 638 to 642. Others apply only to solicitor-client taxations, e.g., Rules 643 to 651. Still other rules apply in part to both and in part to one, e.g., Rules 627 to 633.

[100] There are few similarities between taxation of party-party costs and taxation of solicitors' accounts. There are no similarities other than the fact that both are done by the same taxing officers and both require service of an appointment. There are different philosophies underlying each procedure, party-party taxations being designed to enable a party to recover the costs to which they are entitled, while solicitor-client taxations are to give clients a simple and inexpensive procedure to have lawyers' accounts assessed independently. On a party-party taxation, the adverse parties in a litigation are involved, and the materials include a bill of costs prepared under

Schedule C or an order, with materials filed in an action and receipts for disbursements. On a solicitor-client taxation, the parties are the lawyer and the client and the materials may include the lawyer's account ant the entire file. These differences suggest that the procedures for each of the two different types of taxation should be clearly delineated.

[101] There are only three matters that logically apply to both types of taxations: those dealing with the powers and limitations of the taxing officer; those dealing with the effect of the taxation; and the appeal procedures.

[102] Currently the rules addressing the powers and limitations of the taxing officers are sprinkled throughout the two taxation procedures, as are the powers of the court relating to taxations. It would make sense to incorporate all of the respective powers of the court and the taxing officer at the beginning of the taxation section.[49] The powers of the court include Rules 650 (order that taxed accounts be enforced as orders of the court; 649 (order solicitor to deliver up client documents); 648(3) (where solicitor fails to provide an account, an order that the solicitor must repay some or all of funds retained on behalf of account); Other rules which should be incorporated include the present Rules 629.1, 634, 635,628, 645(2), 629, 652, and 654.

[103] It would be logical to include Rules 636 and 637 (effect of taxation) after the section on taxing officers' powers and limitations, and before the separate procedures for the two different types of taxation. These sections could then be followed by the distinct procedures for party-party costs , including the present Rules 629.1, 633, 630, 631, 638 to 642. The procedures for solicitor and client taxations would be next, including the present Rules 613,614, 626 and 643. The appeals procedure would follow.

POSITION OF THE COMMITTEE

[104] The Committee is of the view that the general organization of the rules about taxation should be as set out in the preceding discussion.

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[49] At this point only the organization of the rules concerning the powers and limitations of the taxing officer are considered; substantive changes to these rules are discussed below.

ISSUE No. 14

(i) What qualifications should a taxing officer have?

(ii) Should there be a first level of appeal from an unspecialized taxing officer to a specially qualified taxing officer?

[105] There are two different definitions of 'taxing officer' in the costs section of The Rules. Rule 600(1)(b) defines the term for the party-party taxation rules as "the clerk of the court for the judicial district in which the proceeding was determined". Rule 643(b) defines the term for solicitor-client taxations as "the clerk or deputy clerk" of a judicial district identified under the rule. In Edmonton and Calgary, most taxations are done by legally qualified taxing officers. Others are done by employees in the offices of the clerks of the court. Sometimes a clerk of the court will refer a taxation to a legally qualified taxing officer, and a considerable amount of consultation goes on. This is not mandatory.

[106] The taxation of costs, particularly solicitor-client bills, is best done by persons with special expertise and experience. Proposals considered by the Committee include annual training for court clerks who do party-party taxations, providing for appeals from employees in clerks' offices to specially qualified taxing officers (a proposal which will be dealt with below), and the appointment of a specially qualified taxing officer to do solicitor-client taxations outside Edmonton and Calgary.

[107] Another issue is whether the specialized and legally qualified taxing officers should be the first level of appeal from taxations performed by clerks. Currently, clerks are able hear taxations and issue rulings. As a matter of practice, more difficult taxations are referred to the taxing officers with legal training, but this is not mandatory.

POSITION OF THE COMMITTEE

[108] Previously the Committee recommended that "Clerks" and "Specialized Taxing officers," each with different responsibilities, should hear costs matters.

[109] Some Committee members felt that to ensure fairness in terms of equal access to justice by self-represented litigants and lawyers, all taxations should commence with the clerk. The clerk will then decide if the matter should be referred to a specialized

taxing officer in the first instance or whether the clerk could issue a ruling. Clerk rulings would be appealed to the specialized taxing officer. Without such a rule, savvy litigants would likely attempt to bring their initial taxations before the specialized taxing officer so that this more qualified officer would hear all the evidence, rather than be limited to reviewing the matter on the record only in an appeal.

[110] Other Committee members disagreed with this suggestion and questioned whether it would be workable for certain matters, particularly if the level of detail fell outside of the experience of the clerks.

[111] The Committee seeks the input of the legal profession as to whether the taxing officer should serve as a first level of appeal from the taxation decisions of clerks, or whether the functions of these two positions should be given equal weight, with appeals from both going directly to the Court of Queen's Bench.

POSITION OF THE COMMITTEE

[112] The Costs Committee solicits the view of the profession on the following proposals:

- court clerks who do taxations should receive annual training.
- taxations by court clerks without special qualifications should be appealable to specially qualified taxing officers.
- solicitor-client taxations should all be done by specially qualified taxing officers
- a specially qualified roving taxing officer should be appointed to do solicitor-client taxations outside Edmonton and Calgary.

ISSUE No. 15

(i) Are the present powers of the taxing officers and the references to the powers of the court in the taxation rules generally appropriate?

(ii) Should taxing officers be able to exercise discretion in taxing the fees portion of party-party fees pursuant to the tariff?

(iii) How much discretion should a taxing officer have in solicitor and client taxations?

Specific Issues under Issue No. 15

(i) Are the present powers of the taxing officers and the references to the powers of the court in the taxation rules generally appropriate?

[113] Currently the powers of taxing officers are scattered throughout the costs rules. The general powers are set out in Rule 628 and include taking evidence; directing production of records; requiring notice of the taxation to be given to all interested persons and giving directions with respect to the form of notice; requiring a person to have representation; and varying time limitations prescribed in The Rules to the extent that the rules or the court allow. They have express authority to overturn retainer agreements to the extent that they are not "fair and reasonable in the circumstances."[50] Rule 635 is the crux of the power of the taxing officer, giving them power to refuse to allow costs that are excessive having regard to the circumstances, specifically including powers to refuse costs for proceedings which were improper, vexatious, prolix, unnecessary, or taken through over-caution, negligence or mistake.

[114] In solicitor-client taxations, Rule 648 provides that, if a lawyer fails to bring a bill to the taxation, the taxing officer may order that the lawyer repay to the client some or all of the money held on behalf of the account; Rule 645(2) provides that the taxing officer may order further details of services and charges; and Rule 652 provides that a taxing officer cannot re-tax an account. Under Rule 629, a taxing officer may award costs of a taxation, but, on a solicitor-client taxation, costs may be awarded against a client who has instituted the taxation only if the taxation request was unreasonable, and costs may only be awarded against a client with leave of the court if a lawyer institutes the taxation.

[115] Some of the costs rules specifically contemplate intervention by the court. Rule 634 provides that the taxing officer may refer questions to the court. Though Rule 628(b) gives taxing officers power to order production of documents, books or records, Rule 649 states that it is for the court to order delivery of client documents. This may be because of privilege issues since there is no definition of "client," as well as the effect of overriding a solicitors' lien.

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[50] R. 646(2).

[116] The taxing officers' powers do not extend to resolving contractual disputes or questions as to liability.[51] The Committee considered whether to recommend that these powers be given to taxing officers, but concluded that the likelihood of encountering constitutional difficulties under section 96 of the *Constitution Act 1867* were too great to make the extension justifiable.

POSITION OF THE COMMITTEE

[117] The Committee proposes that the current powers of taxing officers and the current rules relating to the powers of the court on taxations be retained.

(ii) Should taxing officers be able to exercise discretion in taxing the fees portion of party-party fees pursuant to the tariff?

[118] An issue which was raised during consultations concerns the discretion that taxing officers exercise in taxing fees under Schedule C. Under the revised Schedule C taxing officers frequently are asked to reduce the amounts prescribed in Schedule C (for reasons detailed below). This issue encompasses the taxing officers' jurisdiction to either increase or decrease the amounts set out in the fixed tariff.

[119] Taxing officers are officers of the court[52] appointed in accordance with section 17 of the *Court of Queen's Bench Act*.[53] For the purposes of both party-party and lawyer and client taxations, taxing officers are defined as clerks of the court for the relevant judicial district (Rule 600(1)(b) and Rule 643(b)). In Edmonton and Calgary there are designated, specialized taxing officers with legal training but in other judicial districts, or when the Edmonton or Calgary taxing officers are absent, taxations are conducted by court clerks who may not have any special training for this task.

[120] The powers of taxing officers are enumerated in The Rules:

> 628 On any taxation the taxing officer has power:
>
> (a) to take evidence either by affidavit or viva voce upon oath;
>
> (b) to direct the production of books, papers and documents;

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[51] *Peterson, Ross v. Kirwood* (1984), 52 A.R. 284 at 286 (Q.B., Master) [*Peterson*]; *Rusnak v. A.C.H.A.I.A. Holdings Ltd.* (1984), 51 A.R. 196 (Q.B.) [*A.C.H.A.I.A. Holdings Ltd.*].

[52] *Peterson, ibid.*

[53] R.S.A. 2000, c. C-31.

> (c) to require notice of the taxation to be given to all persons who may be interested in the taxation or in the fund or estate out of which the costs are payable;
>
> (d) to give directions as to the manner of service of any notice of taxation;
>
> (e) to require any party or person to be represented by a separate solicitor;
>
> (f) unless expressly restricted by the court, from time to time to enlarge or abridge the time appointed by any Rule, or fixed by any Rule or order for any proceedings before him and enlargement may be ordered, although the application therefor is not made until after the expiration of the time appointed or allowed.
>
> 629 The taxing officer has the power to allow or disallow costs of proceedings before him, and to fix the amount thereof, but on the taxation of a solicitor and client bill (a) costs shall not be allowed against the client on a taxation at his instance unless the taxing officer is of the opinion that the client has acted unreasonably in applying for taxation, and (b) costs shall not be allowed against the client upon a taxation at the instance of the solicitor except by leave of the court.

[121] Other powers are found in Rule 635:

> 635(1) The taxing officer may refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved.
>
> (2) The taxing officer may refuse to allow the costs of all or any part of proceedings that were
>
> (a) improper, vexatious, prolix or unnecessary, or
>
> (b) taken through over-caution, negligence or mistake.

A specific limitation is that taxing officers may not vary any bill of costs to which a lawyer on behalf of a party has consented (Rule 629.1). Under Rule 634 the taxing officer may refer to the court for determination of any question arising on a taxation.[54]

[122] The rationale underlying the jurisdiction of a taxing officer to reduce the fees in Schedule C is discussed in *Procinsky v. Biel*.[55] Schedule C is a block tariff, designed to allow a successful litigant a lump sum for each of several stages in an action, rather

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[54] It is interesting to note that there is no equivalent of r. 645(2) in the party-party taxation section, allowing the taxing officer to order further particulars of fees or disbursements. Apparently this power is only applicable to solicitor and client taxations and not to party-party taxations.

[55] (1999), 73 Alta. L.R. (3d) 126 (Q.B., Taxing Officer).This decision was affirmed in *Shillingford*, *supra* note 20; *200679 Investments Ltd. (c.o.b. Greystone Property) v. Randell* 2001 ABQB 453 and *Beavis v. Sundquist*, 2001 ABQB 711.

than to receive partial indemnity for each and every action taken by the solicitor. The block tariff does not attempt to determine the amount of actual or full indemnity. The relevant rules are that:

(i) Rule 600(1), which provides that a taxing officer may allow "all reasonable and proper expenses which any party has paid or become liable to pay ...";

(ii) Rule 605, which limits the "charges of barristers and solicitors" to the amount prescribed in Schedule C, unless otherwise ordered;

(iii) Rule 635, which permits a taxing officer to "refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved...".

[123] A large body of case law affirms the jurisdiction of the taxing officer to reduce the amounts in Schedule C in appropriate circumstances. Some of these cases go on to suggest that there is a duty on the taxing officer to determine whether matters warrant the full amounts available in Schedule C.[56]

[124] In *Procinsky*, the taxing officer noted that the 1998 amendments to Schedule C had increased the need for the exercise of discretion with respect to the amounts in Schedule C. Specifically, the combination of the increased fees and the merging of several stages of the litigation into fewer items had "augmented exponentially the taxing officer's obligation to weigh each and every item and to reduce it where appropriate". The conclusion reached in *Procinsky* is that the amounts in Schedule C are maximum amounts that may be awarded to a successful party, but the maximum should only be awarded if it is appropriate to do so in the circumstances.

[125] The argument against giving taxing officers discretion to vary the fixed amounts in Schedule C is that items have been "valued" legislatively in the Schedule, thus taxing officers should not deviate from Schedule C absent a court order. Permitting discretion also invites litigation over bills of costs and leads to added expense and delay in the resolution of an action.

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[56] *Garvie v. Coleman* (1919), 3 W.W.R. 511 (Alta. C.A.).

Comments from the Legal Community

[126] Several members of the Bar commented that problems arise when taxing officers exercise discretion over Schedule C fees. They confirm that parties are often requesting taxing officers to reduce Bills of Costs calculated under Schedule C, which delays the conclusion of actions and further increases the costs of the litigation. Some would prefer that the fees in Schedule C be absolute unless the court orders otherwise.

[127] Differences in taxation practice between Calgary, Edmonton and other areas of the Province became evident through both the consultation and the Committee discussions. It appears to be the lawyers' views that in Calgary taxing officers seldom exercise discretion when taxing fees under Schedule C, while in Edmonton discretion is often exercised. Despite these apparent differences in practice, we have been informed by the taxing officers that most issues are discussed between the two centres, and there is a great deal of agreement as to the preferable approaches.

[128] One of the taxing officers commented that most matters of taxation do fall within the expertise of the taxing officers, with the exception of issues such as experts' fees and steps taken during the trial such as the attendance of second counsel. He noted that if minimal judicial directions were given on these specific matters taxations would be more efficient and would likely solve the majority of issues relating to the discretion of the taxing officers.

Position of the Committee

[129] The Committee members' views differed on the extent of discretion that a taxing officer should exercise in varying fees under a fixed tariff. It was noted that the taxing officers have a great deal more experience with most aspects of taxing accounts than do most judges. A problem with giving significant discretion to the taxing officer is that the taxing officers are not present for the trial or hearing and cannot have the same understanding as the trial judge of every factor that should be taken into account in assessing costs.

[130] One suggestion was that discretion could be limited to "line items" in that some items in the fixed tariff may be set and others adjusted. An example of an item that could be subject to discretion is a time-based matter such as preparation for trial. It

would be up to counsel to justify a full fee under the Schedule. The Committee did not reach a consensus on this suggestion.

[131] While there was general agreement that the Schedule should maintain a balance between certainty and discretion, the Committee would like the legal profession's views as to how much discretion a taxing officer should have in adjusting the fees fixed in the tariff and whether there should be more or less discretion given to the taxing officer.

(iii) How much discretion should a taxing officer have in solicitor and client taxations?

[132] The issue of how much discretion a taxing officer should have in taxing solicitors' accounts has been raised during consultation. This question involves different considerations than those discussed in the previous issues of discretion in party-party taxations.

[133] In Alberta, the same tariff schedule (now Schedule C) governing party-party taxations also guided the taxing officer's discretion in lawyer and client taxations. Through the 1950s and 1960s lawyers' billing practices changed considerably and tariff schedules ceased to be applied to lawyers' accounts in the lawyer and client context. The guiding principle that replaced the tariff system is *quantum meruit*,[57] evaluated in terms of the factors listed in Rule 613[58] and interpretation of those factors. It has been said that the legal system has these rules to ensure that clients are charged lawyers' fees that are fair and reasonable".

[134] The taxing officer's job has been characterized as an administrative decision-maker whose area of expertise is lawyers' fees.[59] Edmonton Taxing Officer

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[57] *Re Solicitor* (1920), 47 O.L.R. 522 (S.C. Master).

[58] Factors similar to those listed in r. 613 are found in other Canadian jurisdictions and were enumerated in *Yule v. Saskatoon (City)*, [1955] 16 W.W.R. 305 (Sask. Q.B.), aff'd [1955] 17 W.W.R 296 (C.A.).

[59] *Rusnak v. Commodity Investors Syndicate of Canada Ltd.* (1982), 48 A.R. 311 at 315 (Q.B.). See also *Panther Petroleum Ltd. v. Code Hunter*, 2002 ABQB 158 at para. 6: "This court simply does not have the time, nor is it the proper function of this Court, to do taxations of first instance, hearing evidence and the like. The Rules contemplate, for good reason, that taxations of first instance will be before skilled, informed taxing officers"; and, *McLennan Ross v. Mercantile Bank of Canada* (1988), 86 A.R. 311 at 313 (C.A.) [*McLennan Ross*]: "the taxing officer's function is a specialized one and he may have to bring his

(continued...)

James Christensen expressed scepticism about the description of the role of the taxing officer, noting the de facto judicial character of the taxing officer's authority to hear and weigh evidence, to review contingency fee agreements, to assess the reasonableness of expenditures, and to refuse excessive costs.[60] The standard of review applied by the courts, "error of principle,"[61] is more akin to findings of fact by trial judges than to the decisions of administrative bodies. Deference seems to be owed not because of the specialization of the taxing officers, but because they are the closest to the evidence and are in the best position to make decisions based on credibility. The standards of review applied indicate that the taxing officer's role involves at least a quasi-judicial exercise of discretion.

[135] The court's characterization of taxing officers as specialized, administrative decision-makers is also problematic given that in Alberta, taxing officers may be unspecialized clerks.[62] Only in Edmonton and Calgary are there specialized taxing officers with legal training, and this training and specialization is not mandated by statute or rule. The rules and the case law, however, make no distinction between the types of taxing officers and the decisions they make.

[136] In addition to the differing role of the taxing officer in party-party taxations from their role in solicitor and client taxations, another difference lies in the subject matter of the taxation. The fees portion of party-party costs are statutorily prescribed in a fixed tariff (presently Schedule C) which may be seen as superseding the discretion of the taxing officer upon proof of completion of particular items. As there is no statutory regulation of solicitor fees there is nothing to limit the taxing officers' discretion in this realm unless the taxing officer refers a question to the court under Rule 634. In the lawyer and client context, the principle of *quantum meruit* may actually require a taxing officer to exercise broader discretion than in the party and party context.

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[59] (...continued)
own experience and expertise to bear".

[60] *Alberta (Treasury Branches) v. Colonial Developments (IV) Ltd.*, [2000] A.J. No. 874 at paras. 48-52 (Q.B.).

[61] *McLennan Ross*, *supra* note 59 at 312.

[62] Rr. 600(1)(b), 643(b).

Comments from the Legal Community

[137] During consultations it was suggested that it is unfair for the taxing officer to reduce hourly billing rates as the client has chosen to use a particular counsel and entered into an agreement as to hourly rates, and the lawyer should be able to recover based on the agreed upon hourly fee.

Other Jurisdictions

[138] In Ontario, the assessment officer's discretion is guided by sections 14 and 7 of the *Solicitors Act*.[63] Section 14 requires the assessment officer to consider "the skill, labour and responsibility" involved rather than the length of the instrument to which the bill pertains. Section 7 states that an assessment officer may allow the costs for unnecessary steps taken by a solicitor where they are of the opinion that the solicitor reasonably judged them to be in the client's best interest. Section 7 also states that the assessment officer may allow costs for unnecessary steps taken at the client's request provided that the solicitor informed the client that these steps were unnecessary. Apart from section 14, there is no equivalent to Rule 613 setting out the factors by which reasonableness is to be measured, although very similar factors have been made applicable through the case law.[64]

[139] The scope for *quantum meruit* based assessment also seems to be narrower in Ontario where assessment officers can only require the opinion of the court where an agreement does not appear to be fair and reasonable (section 18). There is no equivalent Ontario provision to Rule 614 that expressly allows taxation of all retainers, regardless of any agreement to the contrary. There are also differences with respect to the scope of discretion in fixing the costs of taxation proceedings. Costs of

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[63] R.S.O. 1990, C. 5.15.

[64] In *Cohn v. Kealey & Blaney* (1985), 10 O.A.C. 344 at para. 11 (C.A.), the Court of Appeal cited the following factors: "the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issues, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay and the client's expectation as to the amount of the fee". These factors are very similar to those enumerated in r. 613.

taxation proceedings are "in the discretion of the officer, subject to appeal, and shall be assessed by him or her when and as allowed".[65]

Other Jurisdictions

[140] The British Columbia provisions in its *Legal Profession Act* governing the registrar's discretion on assessing a lawyer and client account are similar in substance to both Ontario and Alberta.[66] If in all the circumstances the charges are fair, the registrar must allow charges incurred for services that were "reasonably necessary and proper" to the matters to which they related, and, in addition, the registrar must allow charges for services that were authorized by the client even if they were not reasonably necessary or proper (section 70(2)). In addition, the registrar may permit charges for unnecessary services provided that they were reasonably intended by the lawyer to advance the client's interest or requested by the client even after being informed that the services were unnecessary.[67] The registrar's discretion with respect to 'all the circumstances' (*quantum meruit*) is guided by the usual list of factors and there is an express provision stating that the registrar's discretion is not limited by the terms of the retainer agreement.[68]

[141] The registrar has broad authority to control the proceedings: the registrar may set the time and place for the hearing; to adjourn proceedings from time to time; administer oaths; take evidence; direct production of documents and give general directions for the conduct of the hearing.[69] The registrar may also order further particulars of a bill, agreement, or bill of costs under review and may extend, shorten or limit the time for proceedings.[70]

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[65] *Solicitors Act*, *supra* note 63, s. 6(3).

[66] S.B.C. 1998, c. 9.

[67] S. 71(3).

[68] S. 71(4) and (5).

[69] British Columbia, r. 32(5).

[70] British Columbia, rr. 57(29.02), 53(4).

[142] The registrar's discretion in awarding costs of the assessment proceedings is more restricted than in either Alberta or Ontario. Generally costs are assessed based on specific level of success of either party, and are assessed against a party that withdraws an application; the registrar only has discretion over the costs of the proceedings in 'special circumstances'.[71]

POSITION OF THE COMMITTEE

[143] The Committee does not make any suggestions for change in the discretion of taxing officers on the taxation of solicitor-client account. Any expansion of discretion is likely to encounter constitutional difficulties.

B. Taxation of Party-Party Costs: Specific Issues

ISSUE No. 16

(i) Are the taxation procedures for party-party costs adequate?
(ii) Who may request taxation of party-party costs?
(iii) Are the rules relating to service of appointments and bringing in other bills for taxation adequate?
(iv) Should party-party taxations proceed if parties fail to attend?
(v) Should there be prescribed forms of required documents in party-party taxations?
(vi) Is an affidavit or certificate of disbursements necessary?
(vii) When may party-and-party costs be taxed?

Specific Issues under Issue No. 16

(i) Are the taxation procedures for party-party costs adequate?

[144] Party-party taxations are governed by Rule 629.1 (restriction on taxing bill of costs to which consent has been given); Rule 630 (securing appointment for taxation); Rule 631 (service of appointment 5 days prior to taxation); Rule 632 (taxation may proceed if party fails to attend); Rule 633 (bills of costs to be divided into fees and disbursements); Rule 638 (person served with appointment must bring in bill of costs if seeking costs or set off of costs, powers of taxing officer if party fails to bring in bill of costs; who may rely on this rule); Rule 639 (costs may be taxed if party fails to

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[71] *Legal Profession Act, supra* note 66, s. 72(1), (2).

appear); Rule 640 (costs not to be taxed until after judgment); Rule 641(procedures if a party is both liable to pay and receiver costs); Rule 642 (disbursements must be supported by a certificate or affidavit of lawyer).

POSITION OF THE COMMITTEE

[145] Except as indicated in the discussion of the specific items under this Issue, the Committee is of the view that the procedural requirements for taxations are generally satisfactory.

(ii) Who may request taxation of party-party costs?

[146] There are some difficulties in terminology. Rule 129 refers to "a person entitled to tax costs," while Rule 638 provides that proceedings under that rule may be instituted by "any person liable to pay costs or by any person whose costs depend on the determination of any other person's costs".

POSITION OF THE COMMITTEE

[147] The Committee is of the view that any party interested in the taxation should be permitted to apply for a taxation. This should be set out in a separate rule at the start of the party-party taxation rules.

(iii) Are the rules relating to service of appointments and bringing in other bills for taxation adequate?

[148] Rule 631(1) requires an appointment for taxation, together with the bills of costs and certificate or affidavit of disbursements, to be served on every party interested in the taxation at least 5 days before the return date. Rule 638 provides that service on

- a party entitled to costs;
- a party entitled to set off any costs against the bill to be taxed;
- a party required to bring in a bill of costs for the purpose of ascertaining the amount of the bill to be taxed

requires the party served to bring in a bill of his costs for taxation at the appointed time, failing which the taxing officer may allow the defaulting party a nominal or other sum for costs or to direct that the defaulting party forfeits the right to any costs.

[149] Collectively, these rules seem likely to bring before the taxing officer at the appointed time all parties with bills of costs to tax in the litigation involved in the bill

of costs. This appears to be useful in the interests of efficiency and minimizing costs. However, it would be better if all parties who are required to bring in a bill of costs should be required to serve it in advance.

POSITION OF THE COMMITTEE

[150] The Committee proposes that

- a person entitled to tax party-party costs, or to require costs to be taxed, must serve an appointment on every party interested in the taxation at least 10 days before the time fixed for the taxation;
- where they are the person entitled to tax, they must serve a copy of the bill of costs to be taxed along with the appointment and must deposit a copy of the bill of costs with the taxing officer;
- a person served who is
  - a party entitled to costs;
  - a party entitled to set off any costs against the bill to be taxed;
  - a party required to bring in a bill of costs for the purpose of ascertaining the amount of the bill to be taxed;
  - a party who is otherwise entitled to bring in a bill of costs in the proceedings

  must serve a copy of their bill of costs on every other person interested in the taxation of that bill of costs at least 5 days before the time fixed for the taxation. If a party required to serve a bill of costs does not do so, the taxing officer should have the powers presently provided by Rule 638(2).

(iv) Should party-party taxations proceed if parties fail to attend?

[151] Rules 632 and 639 are substantially duplicative, as each provides that the taxing officer may proceed with a taxation despite the non-appearance of a party. The primary difference between the two is that Rule 632 requires proof of service of the appointment and supporting materials, while Rule 639 does not. Anecdotal evidence suggests that non-appearance at taxations is not uncommon for parties against whom costs are to be taxed.

POSITION OF THE COMMITTEE

[152] The Committee proposes to retain a provision similar to that currently in Rule 632. The taxing officer may proceed *ex parte* in the absence of one or more parties upon proof of service of all documents required of the attending party.

(v) Should there be prescribed forms of required documents in party-party taxations?

[153] Currently there are no forms in the rules for taxation documents.[72] As a result several rules in the taxation Part deal with forms of documents required for the taxations.[73] The sample forms in the Costs Manual include excerpts from various rules pertaining to the taxation (such as the requirement to bring certain documents to the taxation), but while this is certainly good practice, there is no requirement that such notification be included in the appointment. There is also little guidance in the rules as to the proper form of a Bill of Costs or Certificate of Disbursements.

POSITION OF THE COMMITTEE

[154] It was agreed that the rules should contain a prescribed form of the bill of costs required in matters between parties. The form should indicate that steps are to be dated and itemized in accordance with the appropriate Schedule C columns, that fees and disbursements are to be kept separate and totalled separately, and that details are to be given as to how witness fees are calculated. Rule 633 would then be redundant.

(vi) Is an affidavit or certificate of disbursements necessary?

[155] Rule 642 requires that a certificate or affidavit of disbursements accompany the bill of costs. The certificate or affidavit must be signed by the lawyer, attesting to the veracity of the disbursements indicated in the Bill of Costs. There is no apparent need for a separate document, as the Bill of Costs should be signed by the solicitor or self-represented litigant and include a statement that the fees and disbursements were incurred in furtherance of the litigation.

POSITION OF THE COMMITTEE

[156] Rather than requiring a separate certificate or affidavit of disbursements, the Bill of Costs should be signed by the solicitor or the self-represented party, together with a statement that all fees and disbursements were incurred in furtherance of the action. This statement should be included in the form.

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[72] There are excellent precedent forms in the Court of Queen's Bench "Costs Manual".

[73] R. 633 requires bills of costs to have separate columns for fees and disbursements, with separate totals for each. R. 653 sets out the style of cause for appointments for solicitor-client taxations.

(vii) When may party-and-party costs be taxed?

[157] Currently Rule 640 provides that party-party costs may not be taxed until after the "judgment or order allowing the costs has been signed, entered, or otherwise perfected...". Although judgments and orders are effective from the time they are signed, it makes sense to refrain from taxing party-party costs until after the judgment or order is entered and thus placed on the court record. Parties often obtain signed consent judgments as part of settlement deals with a proviso that they will not be entered as long as specific conditions are met, and those settlement conditions normally would address costs in some fashion. Allowing a party to tax costs that are otherwise subject to a settlement agreement simply leaves open an avenue for abuse.

[158] It is not clear what the phrase "or otherwise perfected" refers to. The only way in which a judgment would not come into force immediately is if there is an order staying that judgment. Stays are addressed in the latter part of Rule 640; taxations may proceed in light of a stay unless that stay expressly applies to the taxation.

POSITION OF THE COMMITTEE

[159] The Committee proposes that party-party taxations should only proceed after the judgment or order allowing costs has been entered. The Committee further proposes that taxations be permitted to proceed in light of stay of proceedings, unless otherwise ordered, as Rule 640 now provides.

C. Taxation of Solicitor-Client Accounts

ISSUE No. 17
Should the right to solicitor-client taxations and the procedures governing taxation of solicitors' accounts be in the rules?

[160] Rule 613 provides that "[b]arristers and solicitors are entitled to such compensation as may appear to be a reasonable amount to be paid by the client for the services performed" having regard to a number of factors. Rule 614 provides that: "[t]he charges of barristers and solicitors for services performed by them are, notwithstanding any agreement to the contrary, subject to taxation as provided by these rules." Either the lawyer or the client can apply for taxation regardless of

whether the matter giving rise to the bill was before the court (Rules 643, 643.1).[74] While a lawyer can sue for an account without taxation, Rule 626 requires a court order before judgment can be entered by default or any costs of the action allowed, and says that the order may direct taxation of the account. Effectively, taxation is a hurdle which must be surmounted before a lawyer can enforce payment of an account to a client.

[161] That is, the rules purport to

- confer on a lawyer a right to reasonable compensation for services;
- confer on a client a right to have the reasonableness of a lawyer's account assessed by a taxing officer, regardless of whether the lawyer's services were rendered in a court proceeding;
- make taxation a condition which must be satisfied before a lawyer can enforce payment of an account through court process.

The authority for Rules 613 and 614 is doubtful. The lawyer's right to reasonable compensation is a right under ordinary law. The inclusion of the client's right to taxation in the rules has been justified on the basis that barristers and solicitors are officers of the court and that the court retains an inherent jurisdiction to assess the reasonableness of their fees even though a client has waived that right by contract. This justification is not entirely satisfactory in relation to a lawyer's account for services that have nothing to do with a court proceeding. It is the Committee's view that a statutory foundation should be provided for the right of a client to have the lawyer's account taxed.

Rules in Other Jurisdictions

[162] In Ontario, the right to the assessment of a lawyer and client account is set out in section 3 of the *Solicitors Act*,[75] under which both clients and lawyers are able to initiate the process provided there are no disputes regarding the retainer agreement or any other special circumstances. If there are no retainer agreement disputes or other special circumstances, the local trial court registrar must grant an order for taxation.

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[74] There are exceptions with respect to lawyers. For example, lawyers must follow the taxation process under the Legal Aid Rules for legal aid files (*P. v. Legal Aid Society of Alberta* (1994), 26 Alta. L.R. (3d) 167 (Q.B.).

[75] *Supra* note 63.

Initiation of the taxation process in Alberta seems simpler in that no order is required; the person initiating the taxation simply makes an appointment with the taxing officer.

[163] In British Columbia the right to initiate an assessment of a lawyer's account is found in a statute outside of the rules of procedure.[76] Unlike Ontario, British Columbia's statute is modern, plain language legislation. Part 8 of the British Columbia *Legal Profession Act*[77] deals with both contingent and other types of retainer agreements as well as the rights and parameters of the taxation process. Issues of procedure on a review of a lawyer's bill are dealt with by referring to the rules of court.[78] A review of a bill is initiated by obtaining an appointment directly from the registrar[79] and the rights of clients and lawyers and limitation periods for obtaining an appointment are set out separately.[80]

POSITION OF THE COMMITTEE

[164] A statutory foundation should be provided for the right to taxation of a lawyer's account for services rendered and disbursements. The Committee does not think that the *Legal Profession Act* is an appropriate place for such a provision: the Law Society's functions relate to the regulation of lawyers' conduct, including the rendering of accounts, but the taxation provisions deal with the relative rights of lawyers and clients, which is not part of the Law Society's function. In the Committee's view, the appropriate place for the legislative provision for the taxation of lawyers' accounts is the *Queen's Bench Act*, as the provision will confirm the Queen's Bench's necessary jurisdiction to ensure that a client has an opportunity to challenge a lawyer's account through the taxation procedure. The provision should also authorize the Lieutenant Governor in Council to make rules governing the taxation of solicitor-client accounts and the recovery of accounts so taxed.

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[76] In the *Legal Profession Act*, *supra* note 66.

[77] *Ibid.*

[78] S. 70(13).

[79] British Columbia, r. 57(29).

[80] Ss. 70(2), (3) respectively.

ISSUE No. 18

Under what circumstances should a solicitor-client account be taxable in Alberta?

[165] Rule 643.1(a) sets out the circumstances in which a solicitor's account may be taxed in Alberta at the request of the client, and Rule 643.1(b) enumerates the circumstances in which a lawyer may request a taxation in Alberta. Some of these requirements overlap, such as contractual provisions in the retainer agreement. Rule 652 also provides that a taxing officer cannot re-tax an account.

[166] In the Committee's view, the provisions of Rule 643 are satisfactory. However, the Committee is concerned to know whether any of those provisions are inconsistent with recent developments about the mobility of lawyers in Canada.

POSITION OF THE COMMITTEE

[167] As at present advised, the Committee thinks that Rule 643.1 is satisfactory and should be maintained, and Rule 652 should be combined with it. However, the Committee requests comment from the Law Society as to whether Rule 643.1 is consistent with recent developments involving the mobility of lawyers in Canada.

ISSUE No. 19

Are the rules governing solicitor-client taxations satisfactory? In particular:

(i) Is the organization of the rules satisfactory?

(ii) Is the terminology used in the solicitor and client taxation rules adequate?

(iii) Should standard forms be utilized in the solicitor and client taxation rules?

(iv) Is the present process for setting appointments for solicitor and client taxations adequate?

(v) Are the rules for appointments for solicitor and client taxations and service of documents adequate?

(vi) Are the limitation periods and events limiting solicitor and client taxations under Rule 647 appropriate?

(vii) Are the sanctions for failing to comply with solicitor and client taxation rules appropriate?

(viii) Should the taxing officer's decision be issued as a judgment or order, so that it can be enforced without further legal steps?

Specific Issues under Issue No. 19

(i) Is the organization of the rules satisfactory?

[168] Although there is a specific heading for "solicitor and client" taxations, the rules governing this particular taxation process are scatted throughout Part 47. Even within the solicitor and client taxation section there is little logic to the order of the rules making them difficult to follow, particularly for lay people who rely on the taxation procedure.

[169] As with party-party costs, some of the procedures for taxing solicitors' accounts are governed by general rules, while others are specific to the solicitor-client taxations. In addition, there are rules scattered throughout Part 47 pertaining to solicitor client taxations.

[170] In sum, rules applicable to taxation of solicitor's accounts include Rule 613 (lawyers are entitled to reasonable compensation); Rule 614 (lawyers' charges subject to taxation);[81] Rule 626 (if lawyer brings action for fees, cannot get default judgment or costs without leave); Rule 630 (appointments); Rule 643 (definition of client and taxing officer); Rule 643.1 (circumstances in which lawyers' accounts may be taxed in Alberta); Rule 644 (lawyers' 'bill of costs' must be signed); Rule 645 (lawyers' 'bill of costs' must describe services and disbursements and taxing officer may order further particulars); Rule 646 (retainer agreements must be provided to taxing officer 7 days prior to taxation, and must be fair and reasonable); Rule 647 (temporal limitations on solicitor and client taxations); Rule 648 (consequences of a lawyer's failure to bring a bill of costs to taxation); Rule 649 (court may order lawyer to deliver up client documents); Rule 650 (proof of service of original account); Rule 651 (how taxations become judgments); Rule 652 (taxing officer cannot re-tax an account); Rule 652 (taxing officer cannot re-tax an account); Rule 653 (style of cause to be used in taxation applications); Rule 654 (applications by lawyers to be made on motion, references by taxing officers to be made by appointment with notice to parties).

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[81] Contingency agreements are discussed separately.

Comments from the Legal Community

[171] During consultations lawyer and client taxations were suggested to be 'antiquated' and an unnecessary control of the legal profession. During public consultation it was suggested that greater public education and awareness is required regarding the availability of the process.[82]

Position of the Committee

[172] The Committee is generally of the view that

- The right of a client to have a lawyer's account taxed should be retained.
- To increase the usability of the solicitor and client taxation process all of the relevant rules should be grouped in one section. As discussed above, the general powers of the taxing officer on all taxations should be in a section preceding both the solicitor and client and party-party taxation parts.
- The Committee is of the view that internally within this section the rules should follow a logical progression:
  - Definitions should be included at the beginning of the section.
  - A rule similar to the current Rule 613 stating that a solicitor has a right to reasonable compensation should follow.
  - The limitations, both temporal and circumstantial, would logically come next, followed by the rules outlining the appointment process and service requirements.
  - This would be followed by the rules governing the taxation process itself, including all sanctions for failing to comply with the taxation rules.
  - The rules governing enforcement of the order and appealing the order should be at the end of the section.

(ii) Is the terminology used in the solicitor and client taxation rules adequate?

[173] 'Bill of costs' is referred to throughout both the sections on party-party taxations and solicitor and client taxations, though this term is used to describe two different types of documents. Most people use the term "Bill of Costs" to describe the document that sets the costs to which a party is entitled at the end of an action, determined in accordance with Schedule C. However, as used in the rules pertaining

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[82] There is a very good handbook available from the Court Taxation Office, and the Law Society website has information on questioning lawyer fees and easy links to the Taxing officer.

to solicitor-client taxations,"Bill of Costs" refers to solicitors' accounts to their client.[83] Using the term "Bill of Costs" in the solicitor-client taxations causes confusion, particularly in light of the fact that many of the clients involved in the taxation process will be unsophisticated lay people. This confusion is seen in the present rules themselves. For example, Rule 633 currently requires 'charges of barristers and solicitors [to] be distinguished from disbursements...'. While this rule appears to be intended to apply to both party-party and solicitor and client taxations (as it is in the general taxation section), literally it does not make sense for this rule to apply to bills of costs in party-party situations as the set amounts in Schedule C do not refer to the "charges of barristers and solicitors". Further, as Rule 645 provides that every bill of costs shall contain a reasonable statement or description of the services rendered, together with a detailed statement of the disbursements, it renders Rule 633 useless in the context of solicitor and client taxations.

[174] The word "costs" in the solicitor-client taxation rules causes additional confusion. It should be replaced with "lawyers' fees," defined to include disbursements.[84]

Position of the Committee

[175] To make the rules more understandable and user friendly, the Committee proposes that the term "bill of costs" should be replaced with a term such as "lawyer's account" in all the rules pertaining to solicitor and client taxations.

[176] Rules 644 and 645(1) should be retained and integrated, requiring accounts that are to be taxed to be signed by the lawyer or a member of the firm seeking to collect the amounts therein, and detailing the lawyer's fees and disbursements.

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[83] The Court of Queen's Bench "Costs Manual: Taxation of a Lawyer's Bill" specifically notes that "bill of costs" refers to a solicitor's account in the context of solicitor client taxations, online: <http://www.albertacourts.ab.ca/cs/taxoffice/TaxationofaLawyers-.pdf>.

[84] R. 644 requires that a bill of costs to be taxed must be signed by the lawyer or member of the firm claiming 'the costs'. R. 635 states that the taxing officer may refuse to allow costs for various reasons. R. 643 defines client as including any person who may be liable for 'costs'. R. 626 provides that an action for "costs incurred" to a lawyer may be brought on certain conditions. This has been interpreted as referring to an action for fees; see *Crowe v. Allford* (1983), 45 A.R. 364 (Q.B.) [*Crowe*] (though one questions why r. 626 is necessary at all as s. 104 of the Alberta *Legal Profession Act* has the same requirement).

[177] The term "costs" should be replaced by "lawyers' fees," defined to include disbursements, except in references to cost of the taxation itself.

(iii) Should standard forms be utilized in the solicitor and client taxation rules?

[178] As with party-party taxations, there are no forms in The Rules that pertain to solicitor and client taxations. Rule 653 sets out the form of the style of cause, indicating that the matter is between the law firm and the client. The Costs Manual contains a good precedent appointment for solicitor-client taxations that informs the recipient of the requirements for the taxation, though again there is no requirement in the rules that this be done.

POSITION OF THE COMMITTEE

[179] The Committee is of the view that a standard form of appointment would assist the lay person greatly in the solicitor and client taxation process. The form of appointment should provide the style of cause currently described in Rule 653 (as being between the client and the law firm). In addition to the date, time and place of the taxation, the form should provide a clear warning that failure to attend the taxation will result in the account being taxed in the person's absence and that a judgment may issue thereafter for the taxed amount.

(v) Are the rules for appointments for solicitor and client taxations and service of documents adequate?

[180] The rules should make it clear that either the lawyer or the client is entitled to apply to have the lawyer's account taxed. The rule governing both party-party and solicitor-client taxation appointments is Rule 630. Rule 631 requires service of an appointment to tax a lawyer's account at least 5 days prior to the taxation. Rule 648 states that if a lawyer is served with the appointment, the lawyer must bring the disputed account to the taxation or suffer consequences (discussed below).

POSITION OF THE COMMITTEE

[181] The Committee's position is that there should be a separate rule governing appointments for solicitor and client taxations. The rule should provide that

- either the solicitor or the client may secure an appointment for a taxation from the taxing officer.

- a lawyer who initiates a taxation must provide a copy of the account or agreement at the time the appointment is secured and attach a copy to the appointment that is to be served on the other party. Rule 650, which deals with delivery of a lawyer's account, is not needed.
- a lawyer who is served with an appointment must bring the account to the taxation as required by Rule 648.
- the appointment should be served 10 days before the time of the appointment to give both parties adequate time to prepare.
- service of the appointment should be made in accordance with the general rules relating to service of initiating documents.

(vi) Are the limitation periods and events limiting solicitor and client taxations under Rule 647 appropriate?

[182] Currently Rule 647 sets out limitations on the availability of solicitor and client taxations. While Rule 647(a) is clear and makes sense (that no account may be taxed after a judgment has been obtained in respect thereof), it does not seem to be necessary, as a taxing officer would not be able to change the amount of a judgment.

[183] Rule 647 prohibits a taxation of a solicitor's account, unless otherwise ordered

- after the expiration of one year from the date of delivery if the account is unpaid.
- if the account was fully paid before the completion of the services
- after 6 months from delivery of the bill if it was fully paid after the completion of the services.

The Committee does not see any reason for these limitation periods. The *Limitations Act* establishes limitation periods for actions by lawyers and clients, and these are, in the Committee's view, all that is needed. The limitations in Rule 647 do not serve any useful purpose.

POSITION OF THE COMMITTEE

[184] Rule 647 should be abolished.

(vii) Are the sanctions for failing to comply with solicitor and client taxation rules appropriate?

[185] The rules provide a number of sanctions for failing to comply with the solicitor and client taxation procedures. As with party-party costs, Rule 632 provides that if a person who has served, or been served with, an appointment and fails to attend, the

taxing officer may proceed with the taxation in that person's absence. Rule 648(2) states that if a solicitor fails to bring the account to the taxation, that solicitor forfeits the right to "his costs" (presumably the amount claimed in the account) unless the taxing officer otherwise directs. Rule 648(3) goes even further: if a solicitor fails to bring in the account, the court may order that the lawyer refund some or all of the monies "paid to or retained by him on account of the costs".

POSITION OF THE COMMITTEE

[186] The Committee is of the view that it is appropriate for a taxation to proceed in the absence of a party upon proof of service of the appointment and required supporting documents. The Committee is also of the view that the sanctions in Rule 648(2) and 648(3) are appropriate. The provision of Rule 632 that the taxing officer may proceed in the absence of a party who has been duly served is sufficient sanction against a non-appearing client.

(viii) Should a taxing officer's decision on a taxation be issued as a judgment or order, so that it can be enforced without further legal steps?

[187] Rule 651 has been interpreted as giving the court (at the Master's level)[85] discretion to enforce a solicitor's taxed account as a judgment of the court,[86] though the rule itself is awkward and cumbersome. Where the court has ordered the delivery of a taxable bill or the taxation of a bill, Rule 651(1) permits the court to order that upon taxation the account automatically becomes an enforceable order of the court upon taxation. Rule 651(2) provides that any taxed account may be enforced upon order of the court on notice.

[188] Although the procedure under Rule 651(2) involves an additional step after the taxation, the Committee noted that a taxing officer does not have power to decide some questions, such as that of liability for the account, whether or not any amounts have been paid towards the judgment, and the basis for any interest claimed.

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[85] *A.C.H.A.I.A. Holdings*, *supra* note 51 at paras. 10-15.

[86] *Ibid.* at para. 3.

POSITION OF THE COMMITTEE

[189] The Committee's view was that the enforcing mechanism for costs decisions should be left as it is. Rule 651 should, however, be clarified so that the mechanism is clear and so as to indicate that an affidavit should always be required in support of an application for judgment, which affidavit should address liability, the amount paid and the amount remaining to be paid, and interest.

D. Appeals from Taxation

ISSUE No. 20

Are the rules governing appeals from taxation satisfactory? In particular:

(i) Are the limitation periods for taxation appeals appropriate?
(ii) Should all taxation appeals be heard in special chambers?
(iii) What evidence should be required for taxation appeals?
(iv) Should taxation appeals be *de novo* or limited to the taxation hearing record?
(v) Should there be first a level of appeal from an unspecialized taxing officer to a specially qualified taxing officer?

Specific Issues under Issue No. 20

(i) Are the limitation periods for taxation appeals appropriate?

[190] Rule 655 imposes a limitation periods on taxation appeals. Appeals must be filed within 10 days and returnable before the court within 20 days.

POSITION OF THE COMMITTEE

[191] It was noted that the 10-day and 20-day time periods are very short, particularly for self-represented individuals. Committee members also felt that a standardized appeal period of all appeals, regardless of level of appeal, would make the rules easier to follow for all concerned. The Committee invites suggestions as to the appropriate time for appeals from taxation.

(ii) Should all taxation appeals be heard in special chambers?

[192] Currently, taxation appeals are heard in regular chambers, which creates some problems due to the number of documents that are introduced in support of the arguments made by the clients and by the lawyers whose account is being taxed.

POSITION OF THE COMMITTEE

[193] The Committee is of the view that having all taxation appeals heard in special chambers might relieve the time pressures in regular chambers. This requirement could either be incorporated into the rules or issued as part of a practice note, which would provide more flexibility.[87] However, given the greater complexity of the requirements for motions in special chambers, the Committee decided to ask for comment on whether special chambers is the appropriate forum for taxation appeals, and, if not, how should taxation appeals be handled?

(iii) What evidence should be required for taxation appeals?

[194] It was questioned whether a transcript of the taxation should be required for a taxation appeal. The taxing officer has advised that all contested taxations are currently tape recorded regardless of whether the taxation is conducted by a taxing officer or a court clerk.

POSITION OF THE COMMITTEE

[195] The Committee questioned whether the rules should specify whether a transcript is required on appeal because varying approaches are currently being taken by the judges conducting appeals where clients avoid obtaining transcripts in order to save costs. The Committee proposes that the rules should require a transcript before a taxation appeal can proceed unless exceptional circumstances exist.

(iv) Should taxation appeals be *de novo* or limited to the taxation hearing record?

[196] Rule 656 provides that taxation appeals are to be heard on the evidence presented at the taxation. It further provides that appeals are to be limited to the items and grounds specified (presumably in the in notice of appeal). The court may order otherwise.

[197] In practice it is not uncommon for appellants to refer to, or file, new evidence in an appeal from the taxing officer. One reason is that some self-represented litigants understand the process more fully after the taxation hearing and realize that additional evidence will improve their cases. However, some lawyers also engage in this practice.

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[87] Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton, Alberta: Alberta Law Reform Institute, July 2004) at 3, Issue No. 3.

POSITION OF THE COMMITTEE

[198] The Committee agreed that, unless otherwise ordered, an appeal from a taxation should be a hearing on the record and not *de novo*. The appeal should also be limited to the grounds raised in the notice of appeal. Rule 656 should be retained.

(v) Should there be a first level of appeal from an unspecialized taxing officer to a specially qualified taxing officer?

[199] Another issue is whether the specialized and legally qualified taxing officers should be the first level of appeal from taxations performed by clerks in the office of the Clerk of the Court. Currently, clerks are able to hear taxations and issue rulings. As a matter of practice, more difficult taxations are referred to the taxing officers with legal training, but this is not mandatory.

POSITION OF THE COMMITTEE

[200] Previously the Committee recommended that the rules contemplate taxations being done "both by clerks and by specialized taxing officers," each with different responsibilities.[88]

[201] Some Committee members felt that to ensure fairness in terms of equal access to justice by self-represented litigants and lawyers, all taxations should commence with the Clerk of the Court, who will decide whether the matter should be referred to a specialized taxing officer in the first instance or whether a clerk could issue conduct the taxation. Rulings by clerks could then be appealed to a specialized taxing officer. Without such a rule, savvy litigants would likely attempt to bring their initial taxations before the specialized taxing officer so that this more qualified officer would hear all the evidence rather than be limited to reviewing the matter on the record only in an appeal.

[202] Other Committee members disagreed with this suggestion and questioned whether it would be workable for certain matters, particularly if the level of detail fell outside of the experience of the clerks.

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[88] See also the Position of the Committee on Issue 14 at 33.

[203] The Committee seeks the input of the legal profession as to whether a specialized taxing officer should serve as a first level of appeal from the taxation decisions of clerks, or whether the functions of these two positions should be given equal weight, with appeals from both going directly to the Court of Queen's Bench.

E. Contingency Agreements and Retainer Agreements

ISSUE No. 21
Are the current requirements for contingency fee agreements appropriate?

[204] The rules relating to contingency agreements were reviewed and updated effective 2000 and the Law Society of Alberta posted on its website a model contingency fee agreement for personal injury matters which reflected the requirements contained in the amended rules. The amendments included changes to Rule 5 to specify the meaning of a "contingency fee agreement". Rules 616 to 618 were repealed and a more detailed set of requirements for a contingency fee agreement to be valid were substituted in Rules 616 to 619.

[205] Most of these changes required more disclosure from the lawyer to the client about the nature of the agreement and the way in which the contingency fee was to be calculated, using "plain language". The client must be advised that the agreement and any accounts rendered under it could be reviewed by a taxing officer and appealed to a judge of the Court of Queen's Bench. The client's signature on the contingency fee agreement must be witnessed, and accounts rendered under the agreement must state that a taxing officer "may, at the request of the client, determine the fairness and reasonableness" of the account or the contingency agreement or both.[89] If a lawyer fails to comply with Rule 616, the lawyer is only entitled to legal fees that would have been payable in the absence of the contingency fee agreement, and without regard to the contingency.[90]

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[89] R. 616(7).

[90] R. 618.

Comments from the Legal Community

[206] A common concern expressed by counsel is that lawyers do not like the new revisions as they feel that there are too many restrictions, resulting in a feeling of being "watched over"; lawyers commented that this practice undermines the credibility and integrity of the legal profession.

[207] The taxing officers support the rules relating to contingency fee agreements, feeling that lawyers generally in the past have not taken sufficient time to explain contingency arrangements to their clients. The new rules have given the taxing officers a unified approach to taxation of contingency fee agreements. The taxing officers believe that the wide discretionary power to vary a contingency agreement allows them to provide a reasonable result for clients.

Position of the Committee

[208] Upon reviewing the specific rules relating to contingency fee agreements and the recent amendments, the Committee members felt that enough safeguards had been implemented with the recent changes and no additional changes were necessary to the contingency fee rules to protect the interests of clients. While acknowledging the comments from the legal profession, the Committee felt that the changes had been introduced as a result of problems that the taxing officers and judges had identified with the earlier rules, and therefore the recent amendments were necessary to protect members of the public entering into contingency fee agreements with lawyers.

[209] The Committee agreed that the current requirements relating to contingency fee agreements should be retained.

ISSUE No. 22
Should the rules give discretion to the taxing officer to address apportionment of contingent fees between successive law firms?

[210] When a file is transferred from one law firm to another during the progress of a file but the fee is only payable when a contingency has occurred (such as settlement or judgment in the file), the taxing officer does not have jurisdiction to resolve the question of entitlement between the two law firms. One suggestion was that the

present rules could be changed to require taxation of all accounts when a file is transferred from one lawyer to another under these circumstances.

POSITION OF THE COMMITTEE

[211] Though some other Canadian jurisdictions require taxation of all accounts when a file is transferred from one lawyer to another under these circumstances, the Committee members did not support it as a solution for the Alberta Rules. The Alberta regime only requires an account to be taxed where there is a dispute and the Committee members supported the continuation of this practice. The Committee noted that this problem can arise even if the contingency has occurred and the question becomes one of apportionment between the lawyers. The Committee recognizes that The Rules do not sufficiently set out the approach to be taken by the taxing officer in resolving such a dispute. One possibility would be to allow a charging lien against future contingency fees, even though the sum of the fee could not be determined until the litigation had been finalized.

[212] The Committee agreed that Rule 625 should be amended to allow a lawyer transferring a file to obtain a charging order under the rule, even if the file is a contingency matter.

[213] The Committee also considered whether the taxing officer should be given the jurisdiction to deal with the question of apportionment between lawyers in the case of a contested contingency fee.

[214] The Committee also considered whether the taxing officers should continue to have a wider discretionary power to vary a contingency agreement[91] than the narrow *quantum meruit* power they are accorded to vary a regular retainer agreement. After discussion the Committee agreed that the wide discretionary power with respect to contingency agreements should be retained but questioned whether a similar power should, or could constitutionally, apply to standard retainer agreements.

[215] The Committee seeks input from the legal profession regarding the feasibility of increasing the jurisdiction of the taxing officer:

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[91] R. 619(4).

(i) to deal with the question of apportionment between lawyers in the case of a contested contingency fee;

(ii) to vary regular retainer agreements, similar to that afforded the taxing officer in dealing with contingency agreements.

ISSUE No. 23
Should the ambit of Rules 616 to 619 be expanded to cover all retainer agreements in addition to contingency agreements?

[216] Rules 616 to 619 provide a detailed "road map" of the required terms of a contingency agreement. As these terms are designed to protect the client, it was questioned whether it would be reasonable to expand these rules to all retainer agreements.

POSITION OF THE COMMITTEE

[217] The Committee agreed that it is not necessary to introduce all of the requirements in Rules 616 to 619 for regular retainer agreements. However, the Committee proposes that the taxing officer have the same powers of review with respect to ordinary retainer agreements as presently exists with respect to contingency agreements. The Committee members felt it was unnecessary to include a statement in every account sent to a client of this right of review, but there should be a requirement that all written retainer agreements include a clause informing the client of the taxation procedures available.

CHAPTER 3. COSTS AS SANCTIONS

[218] The most common sanction imposed by a court is costs. Costs may be used as a penalty for failing to comply with certain rules, or for other behaviour that the court deems worthy of punishment.

[219] Many rules provide that the court may order costs as the result of particular conduct (or misconduct). In most cases the amount of costs resulting from the transgression is in the discretion of the courts. Some rules guide the court's discretion in this regard, such as Rule 190(1) which provides a default penalty of two times item 3(1) in Schedule C for failing to file and serve an affidavit of records within the prescribed time period.

ISSUE No. 24
Should there be an omnibus rule dealing with costs awarded for failing to comply with the rules rather than provisions in specific rules?

A. An *Omnibus* Rule

[220] Many of the current rules contain a general statement to the effect that the court may award costs for various infractions of the rules. Other rules are more specific about costs sanctions, and expressly address, to some extent, factors to guide the court's discretion with respect to costs.[92]

[221] When looking at the list of rules that expressly state that a court may award costs, the initial question is whether it is desirable to have separate provisions permitting the court to award costs as sanctions in different situations. The alternative would be to include an omnibus provision stating that the court has the discretion to award costs whenever there has been a breach of the rules or other misconduct. A general costs sanctions rule would allow many of the existing subsections of rules to be eliminated, resulting in a shorter set of rules (which is one of the goals of the Rules Project).

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[92] See, for example, r. 190(1), which provides a default penalty of 2x item 3(1) in Schedule C for failing to file and serve an affidavit of records within the prescribed time period.

[222] Rule 601 provides that costs are in the discretion of the court. It provides that the court may consider specific things when ordering costs, including conduct that has unnecessarily lengthened a proceeding; refusal to admit anything that should have been admitted; and whether any step was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution. It is, or could easily be made to be, an omnibus provision covering all breaches of the rules and other conduct for which costs should be ordered as a sanction (assuming that "proceeding" includes interlocutory proceedings). Despite the apparent inclusive nature of Rule 601, however, there are still numerous express references to awarding costs throughout the rules.

POSITION OF THE COMMITTEE

[223] The Committee proposes that one general omnibus rule should provide for awards of costs as sanctions.

[224] The Committee invites comment as to whether or not the omnibus rule should list factors to be taken into consideration.

B. Provisions for Specific Cases

[225] The Committee considered whether a number of specific rules relating to costs sanctions should be accommodated in the omnibus rule, whether by specific reference or general terms.

1. Rules 128 and 230 (failure to admit facts)

[226] The General Rewrite Committee considered Rule 128, which provides that the court may make an order with respect to admissions that ought to have been, but were not, made, and suggested that this sanction should be retained and consolidated with the costs rules. The Discovery and Evidence Committee considered the costs sanctions for failing to admit facts or opinions following a notice to admit under Rule 230. It was of the view that instead of limiting the sanction available for failing to admit a particular fact to the cost, at trial, of proving that fact (an amount often impossible to quantify), it would be preferable to have the court take a broader view and incorporate the failure into its overall consideration of costs, essentially adopting the provisions in

Rule 601(1)(f), which makes a failure to admit a fact a factor in the general award of costs.

POSITION OF THE COMMITTEE

[227] The Committee agrees that the effect of Rules 128 and 230 should be carried forward, but that the court should be able to incorporate failures to admit into its overall consideration of costs.

2. Rules 218 and following (admission of expert opinions)

[228] The Discovery and Evidence Committee also reviewed the rules relating to the admission of expert opinions,[93] particularly Rule 218.15. It found that the existing costs consequences in those rules are appropriate to discourage parties from unnecessarily challenging the admissibility of such opinions and, hopefully, to provide a check on the number of experts a party calls.

POSITION OF THE COMMITTEE

[229] The Committee agrees with the position of the Discovery and Evidence Committee.

3. Rule 190 (default in delivering affidavit of records)

[230] Another issue considered by the Discovery and Evidence Committee concerned the costs penalties relating to filing and service of affidavits of records in Rule 190. That Committee suggested that the penalties be amended to allow the court some discretion in awarding an amount either greater or lesser than two times item 3(1) of Schedule C. It further proposed that there be an express reverse onus on the party who failed to serve the affidavit of records to show why the penalty should not be imposed.

POSITION OF THE COMMITTEE

[231] The Costs Committee thought that, before the specific costs sanctions of Rule 190 are changed, comment should be sought from the Bar.

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[93] Rr. 218.5, 218.7, 218.8, 218.9(1), 218.11, 218.15.

4. Failure to follow a litigation schedule

[232] In Consultation Memorandum 12.5, the Management of Litigation Working Committee of the Rules Project proposed that all parties must agree to a litigation schedule in all actions filed in the Court of Queen's Bench. If the lawyers fail to agree on a schedule for a particular case, then a Default Schedule prescribed in The Rules will apply, or the parties can approach the court to assist them in developing an appropriate schedule for that particular matter. The Management of Litigation Working Committee did not address the question of what sanctions would apply if the parties deviate from the schedule. However it did return to this issue in the Consultation Memorandum, after hearing feedback on the concept of litigation management and the timelines in the default schedule.

POSITION OF THE COMMITTEE

[233] The Management of Litigation Committee determined to leave the schedule, either default or customised, and its enforcement, in the hands of the lawyers and the parties. The Schedule does not become a formal timetable unless and until it is incorporated either totally, or partly, by way of a case management order. At that point the court may use its existing set of tools to deal with failure to comply with the court's order.

[234] Both the Management of Litigation and the Costs Committees were of the view that automatic penalties for minor deviations would be counterproductive. The court has not been reluctant, in the past, to take jurisdiction over its own processes and impose penalties where these are justified.

[235] The Committee proposes that parties be able to agree to alter or amend the Schedule for appropriate reasons, without penalty. Sanctions should only be imposed if a party deviates from the Schedule without consent. There should not be any sanctions for failure to follow the Schedule, rather, sanctions should only be imposed by the court on motion of the aggrieved party, once the Schedule has been incorporated as a case management order.

5. Sanctions for misconduct

[236] Currently there are several rules which contemplate an award of costs as a punishment for misconduct beyond simple noncompliance with the rules. Some rules apply to both counsel and parties, while others apply either to counsel or to parties.

[237] Rule 599.1 allows the court to award costs against anyone whose failure (without reasonable explanation) to comply with the rules interferes with the proper or efficient administration of justice. Unlike other rules imposing costs sanctions, under Rule 599.1 costs are to be paid to the court rather than to another party.[94] Rule 704(2) also permits the court to order punitive costs against any person as a remedy for contempt.

[238] Rule 602 specifically provides that costs may be ordered against counsel. Generally Rule 602 has been applied against lawyers acting in bad faith, including:

> (a) ...acting for a party which does not exist, or is not competent from infancy of mental defect, or has not given proper authority e.g. because of bankruptcy.
>
> (b) ...being the real instigator of the suit and person for whose benefit it is run.
>
> (c) ...serious misconduct in prosecuting or defending a suit for a client. Some cases say that starting a hopeless suit is enough, but more recent ones disagree, and look for real misconduct...[95]

Position of the Committee

[239] The Committee was of the opinion that Rule 599.1 has considerable utility and should be retained. Rule 602 should be retained so long as it continues to be used only in the most serious of circumstances.

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[94] *Baltimore v. Baltimore* (1997), 197 A.R. 77 (Q.B.); *Pollock v. Liberty Technical Services Ltd.* (1997) 50 Alta. L.R. (3d) 335 at para. 14 (Master); *Milfive Investments Ltd. v. Sefel* (1998), 250 A.R. 183, 1998 ABCA 164 at para. 3 (additional reasons (1998), 216 A.R. 196, 1998 ABCA 161). *Hunter v. Preston* (2001), 277 A.R. 151, 2001 ABCA 35; *V.A.H. v. Lynch* (2001), 293 A.R. 395 (*sub nom. Huet v. Lynch*, 2001 ABCA 211).

[95] The Honourable William A. Stevenson & The Honourable Jean E. Côté, *Alberta Civil Procedure Handbook 2005* (Edmonton: Juriliber, 2005) at 585 [*Civil Procedure Handbook*].

CHAPTER 4. COSTS AWARDS IN CLASS ACTIONS

ISSUE No. 25
Should the revised rules make special provision for the award of costs in class proceedings?

[240] In its Final Report No. 85, Recommendation 22,[96] the Alberta Law Reform Institute recommended that a costs scheme be implemented along with class action legislation:

> RECOMMENDATION No. 22
>
> (1) Unsuccessful parties to the class proceeding should not be liable to pay costs unless:
>
> (a) there has been vexatious, frivolous or abusive conduct by a party,
>
> (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> (2) Class members, other than the representative plaintiff, should not be liable for costs except with respect to the determination of their own individual claims.

[241] The recommendation was based on the Uniform Law Conference of Canada (ULCC) model *Class Proceedings Act*.[97] The intended effect of the proposal was to encourage access to justice by means of class actions by following a "no costs" approach.

[242] The Alberta *Class Proceedings Act* did not deal with this recommendation. Section 37 merely provides that "[t]he Court may award costs as provided for under the Rules of Court." It is not entirely clear whether the Legislature intended that the usual costs rules should apply in class actions, or whether it merely intended to leave the question of class action costs to the rule-making process.

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[96] Alberta Law Reform Institute, *Class Actions* (Final Report No. 85) (Edmonton, Alberta: Alberta Law Reform Institute, December 2000) at 154, online: <http://www.law.ualberta.ca/alri/pdfs/final_rprts/fr85.pdf>.

[97] Online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1c2>.

Rules in Other Jurisdictions

[243] The only other Canadian jurisdictions which provide for costs awards against unsuccessful representative plaintiffs in class actions are Ontario and Quebec. A no-costs approach has been taken in British Columbia, Saskatchewan, Newfoundland, Manitoba and the Federal Court. Ontario and Quebec have established funds to assist representative plaintiffs with the funding necessary to commence a class action and the payment of costs if costs are awarded against them. Both jurisdictions have also provided for the amelioration of costs. Ontario has given the court express discretion, in determining costs, to consider whether the class proceeding is a test case, raises a novel point of law or addresses an issue of significant public interest. Quebec has made special provisions for minimizing costs consequences to representatives in class actions by providing that such costs be assessed under a lower scale.

Position of the Committee

[244] The Committee considered the question of class action costs before the delivery of the Court of Appeal's decision in *Pauli v. ACE INA Insurance Co.*[98] Because the *Class Proceedings Act* is in its early days and it may be too soon crystallize approaches to it, the Committee was wary of suggesting sweeping changes to the costs rules for class actions. It thought, however, that some minimum guidance as to costs for class actions is desirable.

[245] The Committee suggests the factors used by Ontario courts should be used in awarding costs in class actions. Specifically, a provision similar to that found in section 37(2) of the Uniform Law Conference's Draft *Class Proceedings Act* might be made applicable to class proceedings:

> In determining by whom and to what extent costs should be paid, a court may consider whether the class proceeding was a test case, raised a novel point of law or addressed an issue of significant public interest.

The Committee thought that such a provision could be added to the list of factors in the current Rule 601. The Committee, however, proposed to ask for further input from the Bar on the issue of how costs should be awarded in class actions.

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[98] 2004 ABCA 253.

Pauli v. Ace

[246] The decision of the Court of Appeal[99] establishes an approach to costs of class actions under the existing Rules. It requires extensive description.

[247] In *Pauli*, two representative plaintiffs brought class proceedings against motor vehicle insurers on behalf of those insured. Insurers claimed that, where insured vehicles are beyond economic repair, the insurers were entitled both to deduct the deductible under the policy and to take title to the salvage. The representative plaintiffs claimed that the insurers could not do so. However, the action was dismissed on the merits.

[248] The representative plaintiffs argued that no costs should be awarded against them because the issue involved a matter of broad public interest, raised a novel point of law, was a test case, and because a costs order would impede access to justice in the context of class actions. In the Queen's Bench, Justice Rooke referred to the Ontario *Class Proceedings Act* section which made the first three factors applicable to class proceedings in that province, and continued:

> Of course, similar considerations, albeit not legislated, are relevant to the Court's broad discretionary power to award costs.

He went on to hold that none of these factors applied to the present case. He therefore awarded costs against the representative plaintiffs.

[249] On the appeal, the Court of Appeal agreed that the general principles of costs under the Rules apply to class actions. It also agreed that all four factors discussed by the Chambers Judge applied. Its discussion of the factors may be summarized as follows:

1. Public interest

[250] The Court referred to factors which make a case one of public interest: a new question where there is a public benefit in the court giving a decision; the interpretation of a new or ambiguous statute; a new or uncertain or unsettled point of practice; no previous authoritative ruling by a court; an application in good faith about a matter of public interest; the resolution of a conflict in the case law; lack of, or modesty of, a pecuniary interest on the part of a litigant. In *Pauli*, the issues affect

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[99] *Ibid.*

every Albertan with collision coverage; success would have effected behaviour modification of all Alberta insurers. The Court noted that the case-management judge had determined that a declaratory judgment would be more efficient, which turned the plaintiffs' relief from monetary to primarily declaratory. "In our view, the issue constitutes a matter of broad public interest."

2. Novel point of law

[251] The Queen's Bench decision had provided an interpretation of the Alberta Insurance Act which differentiated it from similar Ontario legislation and corrected a previous District Court judicial interpretation of the provision. The question as framed by the case-management judge was novel.

[252] Further,

> To allow costs[100] where a novel point of law is determinative of the issue solely because one party is innocent of any wrongdoing, as the chambers judge did in this case, may effectively deny a "no costs" order in most cases.

3. Test case

[253] The interpretation of the Insurance Act contended for by the representative plaintiffs would have established a legal principle that would determine other actions in Alberta and be persuasive in other provinces where similar statutory language exists. The decision appeared to be the only judgment that analyses this particular statutory phrase. Given the conflicting cases, the issue in this case met the requirements.

4. Access to justice

[254] The Court's discussion of public interest, novel point of law and test case applies to actions generally. Its discussion of "access to justice" relates to class actions. The Court points out that

> it is arguable that [class] actions increase access to justice by allowing many claimants to pool their resources to pursue claims together that they could not pursue individually because of small monetary amounts at stake. But the reality is that large cost awards against unsuccessful

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[100] The Memorandum of Judgment reads "To deny costs...", but this appears to be in error, as the Court of Appeal was considering the effect of allowing costs.

> plaintiffs will have a chilling effect and likely discourage meritorious class actions

and refers to arguments canvassed, inter alia, by the Alberta Law Reform Institute in its Final Report No. 85, *Class Actions* at pages 147-154. There must be a balance between encouraging class actions that have potential merit and discouraging those that may be frivolous or vexatious. An award such as that made in the Queen's Bench would curtain access to justice because it would have a chilling effect on future potential litigants.

[255] The Court thus decided that all four factors were satisfied, and it ordered that there should be no costs award in relation to the issue on the merits. However, it is not necessary for all four factors to be satisfied. The Court said:

> Meeting one or more individual criteria is not necessarily determinative. Rather, different weight may be given to each factor depending on their relationship to other pertinent considerations. Therefore, in exercising discretion to depart from the normal rule that costs follow the event, a judge will ultimately view the mix of factors as a whole.

[256] Insofar as the factors pertained to the motion for determination of the merits, the Court found it appropriate to make a no-costs order both in the Queen's Bench and in the Court of Appeal.

[257] In the result, it appears that the court's discretion extends to making a no-costs order in a class proceeding. In exercising the discretion, the court should consider at least the four factors to the extent that they apply. The decision does not exclude consideration of other factors.

[258] Indeed, in *Pauli*, both the Queen's Bench and the Court of Appeal did award costs against the representative plaintiffs in respect of part of the certification and case management proceedings. This was because the plaintiffs pursued the certification proceedings at the same time the merits motion was proceeding, which resulted in unnecessary costs being incurred. Thus, both courts applied general principles of costs as well as the special principles applicable to cases such as *Pauli*.

Invitation to Comment

[259] Comments are invited as to whether special principles should apply to the award of costs in class actions, and, if so, what they should be, bearing in mind the effect of

Pauli v. Ace. Comments are also invited as to the appropriateness of the application of the public interest, novel point and test case criteria in general, and as to whether access to justice should be a consideration in the award of costs in general.

CHAPTER 5. SECURITY FOR COSTS

[260] Rules 593 to 599 govern the procedures for security for costs applications. Rule 524 addresses security for costs on appeal.

[261] Originally the security for costs rules were designed to protect defendants by ensuring that unsuccessful plaintiffs would be able to cover costs at the conclusion of the proceeding.[101] The security for costs rules were amended in 1997 with the addition of Rule 593(1.1),[102] which had the effect of expanding the scope of the rule to permit the court to award security for costs against any party, where it is "just and reasonable to do so in the circumstances".

Comments from the Legal Community

[262] While there were several suggested reforms to the rules governing security for costs from the legal community, many of the suggestions are actually addressed in the present rules. It seems clear from these comments that there is some sort of discontinuity between the wording of the rules and their application. For example, it has been suggested that despite the fact that nothing in the rules prevents it, courts have been reluctant to make orders for security for costs against self-represented litigants. This is probably an attempt to reconcile the competing interests of access to justice and fairness to all parties. One approach that has been developing is reflected in a comment submitted to the ALRI Rules of Court Costs Committee from the Calgary Masters:

> It is becoming a common practice to grant security for costs until the end of discovery and then give leave to reapply for further security if the matter appears to be going to trial. Alternatively, it is also common to order that the payment of security for costs be stayed until after discovery. This is done because the Schedule C costs for trial are very high, and to order security for costs including trial costs would likely end the action. Often there are legitimate actions which ought to go to discovery, thus these practices have been adopted to permit parties to have access to justice.

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[101] *Tkazcuk v. Frocan Industrial Contractors Ltd.* (1993), 15 Alta. L.R. (3d) 4 at 7 (Q.B.).

[102] Alta. Reg. 269/1997.

ISSUE No. 26

Are the grounds for ordering security for costs in Rule 593(1) appropriate, or is it desirable to have a more general rule, such as Rule 593(1.1)?

[263] Currently Rule 593(1) sets out ten separate grounds upon which costs may be ordered. The general purpose of security for costs is to protect the defendant by ensuring that a plaintiff is able to pay costs if it is ultimately unsuccessful in the action.[103] Presumably the categories enumerated in Rule 593(1) are intended to represent situations where it is most likely that a defendant would have difficulty enforcing a judgment or collecting costs against a plaintiff. Subsections (c),(d),(f) and (g), for example, seem to address situations where the action is abusive, frivolous or vexatious. This seems to go to the very heart of the policy issues underlying the rules.[104]

> The fundamental policy balance appears to be between the desire not to unnecessarily or unfairly impede access to the Courts by legitimate and bona fide Plaintiffs and the desire to ensure that the administration of justice is not perverted by encouraging risk-free and doubtful litigation claims by Plaintiffs to the harassment of, and to the imposition of practically unrecoverable cost upon, Defendants who are possessed of facially meritorious answers to such claims.
>
> Both policy considerations deserve great respect. Access to the Courts is a matter going to the very heart of the viability and credibility of the administration of justice. Limitations on that access should be driven by strong grounds of policy: see e.g. B.C.G.E.U. On the other hand, the uses of recoverable and case-related costs has long been accepted as a means of regularizing the processes of Courts and ensuring fairness therein. Moreover, the use of costs is to serve the further aim of discouraging the phenomenon of legal proceedings which become the tool of the recreational litigant or, worse, the litigation terrorist. Judicial notice can, arguably, be taken about the litigation atmosphere of our great southern neighbour. There, costs do not have the same function or characteristics as they do in Canada.[105]

[264] Under Rule 593(1)(i), security for costs may be ordered pursuant to any statute which entitles a defendant to security for costs. The statutory provision most

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[103] *Tkaczuk, supra* note 101.

[104] *475878 Alberta Ltd. v. Help-U-Sell Inc.* (2002), 294 A.R. 151 at paras. 119-120, 2001 ABQB 517.

[105] *Ibid.* at paras. 118-119.

commonly relied upon is section 254 of the *Alberta Business Corporations Act* ("ABCA"):[106]

> In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

Other statutes specifically address security for costs,[107] though in each case the court retains discretion as to whether security for costs should be ordered. Some statutes note that a party may not be required to post security for costs.[108]

[265] In 1997, the grounds upon which security for costs could be granted were expanded with the addition of Rule 593(1.1), allowing the court to order security for costs against any party, not just a plaintiff.[109] The grounds for security for costs were extended beyond the categories set out in Rule 593(1).

[266] Rule 593(1.1) is clearly an "additional, independent, discretionary, ground for awarding security for costs,"[110] to be considered separate and apart from the grounds listed in Rule 593(1) or section 254 of the ABCA or its counterparts. Several decisions have emphasized the fact that Rule 593(1.1) should be given a broad, purposive interpretation.[111] It has been applied in many situations where the plaintiff did not fit

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[106] R.S.A. 2000, c. B-9.

[107] *Public Trustee Act*, R.S.A. 2000, c. P-44, s. 18 (leave to commence proceedings against mental incompetents' estates subject to terms as to security for costs or otherwise that to the court appears just); *Land Titles Act*, R.S.A. 2000, c. L-4, s. 193 (in actions regarding caveats and liens, the court may order security for costs against a non-resident for costs of applicant); *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 2(4)(a) (in actions for nuisance falling under the *Act*, the court may order security for costs); *Companies Act*, R.S.A. 2000, c. 21 s. 101(1)(b) (where a company fails to prosecute diligently actions for insider trading, the court may make order for security for costs); *Fair Trading Act*, R.S.A. 2000, c. F-2, s. 17(4) (Court may order security for costs against consumer organizations who have commenced actions against suppliers under the *Act*).

[108] *Cooperatives Act*, S.A. 2001, c. C-28.1, s. 156(12); *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-20, s. 295; *Alberta Business Corporations Act*, *supra* note 106, s. 200(11).

[109] *Rushton v. Condominium Plan No. 8820668* (1998), 219 A.R. 51 (C.A.) [*Rushton*].

[110] *679667 Alberta Ltd. v. Allendale Bingo Corp.*, 2001 ABQB 802 at para. 4 [*Allendale Bingo*].

[111] *Sinha v. Sinha*, [1999] A.J. No. 789 (Q.B.); *Wirtz v. Coopers Lybrand* (2000), 250 A.R. 356 (C.A.); *Style Furniture (Vegreville) Ltd. v. Zurich Insurance Co.* (1998), 232 A.R. 146 (C.A.); *Allendale Bingo*,

(continued...)

into one of the categories enumerated in Rule 593(1) or under the ABCA.[112] It has even been applied in Provincial Court.[113] Most notably, the rule has been interpreted as eliminating the requirement that a defendant must show that a plaintiff lacks sufficient assets in Alberta to cover costs.[114]

Solvency of a Party as a Consideration in Security for Costs

[267] One issue raised during consultation is whether a party's solvency should always be considered in security for costs applications. Solvency is presently a consideration in some circumstances: Rule 593(1) provides that the plaintiff's solvency (evaluated on the basis of assets in Alberta) is relevant in circumstances of: (e) informers; (g) where an action appears frivolous and vexatious; and (h) class actions.

[268] Additionally, Rule 595 provides that

> If it is made to appear upon the application that the plaintiff is possessed of sufficient property within the jurisdiction that will be available for the defendant's costs, the order may be refused.

In effect, Rule 595 requires the court to consider the plaintiff's financial situation once the defendant has established *prima facie* grounds for a security for costs order. Several cases note a concern with Rule 595: particularly when the assets in issue are liquid, it is not difficult to dispose of them in an effort to become "judgment-proof." Accordingly, the presence of assets within the jurisdiction at the time of the application may not sufficiently address the real concerns underlying the security for costs application.

[269] The Federal Court has chosen to favour access to justice over *pro forma* fairness. Rule 417 of the Federal Rules specifically provides that the court may refuse to order security for costs (unless provided for under another enactment) where the plaintiff demonstrates impecuniosity and the court is of the opinion that the case has merit.

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[111] (...continued)
ibid.

[112] *Ritter v. Hoag*, *supra* note 34.

[113] *Norheim v. Still*, 2002 ABPC 117, per Lefever Prov. Ct. J.

[114] *Taylor & Associates Ltd. v. Dubuc* (2003), 13 Alta. L.R. (4th) 353, 2003 ABQB 30 (Master); *Ritter v. Hoag*, *supra* note 34; *Allendale Bingo*, *supra* note 110.

POSITION OF THE COMMITTEE

[270] The creative application of Rule 593(1.1) since its inception in 1997 suggests that the "shopping list" of grounds in Rule 593(1) is inadequate. The Committee favours removing the 'pigeon holes'. Instead, the availability of security for costs should be determined on the basis of:

(1) whether it is likely that the applicant will be able to enforce against assets in Alberta;
(2) the solvency of the respondent party;
(3) the merits of the action;
(4) whether to order security for costs would unduly prejudice the respondent's ability to continue the action; or
(5) any other factor the court considers relevant.

[271] The Committee proposes that a general rule, similar to current Rule 593(1.1), should be adopted, taking the above factors into account. This will most effectively encompass the traditional grounds for seeking an order for security for costs and allow for creative application of the court's discretion to impose security for costs in new situations as they arise. This approach also permits the court to effectively balance concerns of access to justice of an impecunious party against the rights of other parties to be granted security for costs in appropriate circumstances.

[272] This proposal would raise for discussion the need for special provisions for security for costs in Rule 159(4)(a) (summary judgement); Rule 216.1 (modification of powers under Part 13, Discovery); and Rules 577.2 and 578.2 (Divorce and other matrimonial causes).

ISSUE No. 27
Should security for costs be available against any party?

[273] Since 1997, Rule 593(1.1) has specifically allowed for an order for security for costs to be given against any party to an action, depending on the circumstances. In short, Alberta already allows for security for costs to be given against any party in

certain circumstances, as noted by the Court of Appeal in *Rushton*.[115] The rule as it is currently written should also has the effect of permitting a third party to seek costs against a defendant or, perhaps, even a plaintiff (although there does not appear to be any case law on this point).

Rules in Other Jurisdictions

[274] The security for costs rules in all other Canadian jurisdictions (except British Columbia, where there are no express rules addressing security for costs) permit only defendants (including a defendant by counterclaim and parties to garnishees and interpleader applications) to seek security for costs against plaintiffs, applicants or petitioners.

Position of the Committee

[275] The Committee sees no policy reasons dictating against imposing security for costs against any party to an action. The comments received during consultations indicate that security for costs orders are being used as a form of self-help by counsel on both sides facing uncertainty, delay, and quite often, frivolous cases. The Committee is of the view that the security for costs rules should continue to be generally available against all parties.

ISSUE No. 28

How should the rules address security for costs for appeals?

a) Should the rules governing security for costs of an appeal be moved to the security for costs part of the rules, or left in the appeal rules?

b) Is the current test of requiring a party to show "special circumstances" adequate?

c) Should the security for costs rules be somehow amalgamated such that the "just and reasonable" factor expressly applies to security for costs applications at both the trial and appellate levels?

d) Should the common law criterion for security for costs for appeals be codified, that once special circumstances are proven, the court may not order security for costs if it is shown that there is a reasonable prospect of success?

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[115] *Supra* note 109.

[276] Currently security for costs in appeals is governed by Rule 524 in Part 39 (Appeal Rules):

> 524(1) No security for costs shall be required in appeals unless by reason of special circumstances security is ordered by a judge.
>
> (2) Unless the court otherwise orders an appellant who fails to give security for costs when ordered shall be deemed to have abandoned his appeal and the respondent is entitled to his costs.

[277] Despite the lack of an express provision, Rule 524 has been interpreted as being available as against both appellant and respondent.[116]

[278] Rule 524 provides that no security shall be required except in special circumstances. "Special circumstances" are to be determined on a case by case basis, including situations where the appellant has no exigible assets, or is likely to be unable to pay the costs of the appeal, if unsuccessful.[117] The categories of "special circumstances" are not closed.[118]

[279] There is a further common law criterion in the test for security for costs of an appeal:

> Once the respondent proves that special circumstances exist, the onus then shifts to the appellant to establish that the appeal has some reasonable prospect of success...[119]

The rationale for this requirement is that a party should not be prevented from pursuing an appeal due to impecuniosity, if the appeal has real merit.[120] In deciding whether there is a reasonable prospect of success, the court considers, *inter alia*, the issue being appealed; whether it is a question of fact or a question of law; the standard

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[116] *Rushton*, *ibid.* at para. 8, per Côté, J.A.

[117] *ABC Color & Sound Ltd. v. Royal Bank* (1990), 76 Alta. L.R. (2d) 73 (C.A.) [*ABC Sound*]; *Ellis v. Friedland* (2001), 277 A.R. 126 (C.A.) [*Ellis*].

[118] *Rushton*, *supra* note 109 at para. 10.

[119] *Ellis*, *supra* note 117 at para. 14; citing *ABC Sound*, *supra* note 117 at 76-77.

[120] *Locke v. Calgary (City)* (1994), 162 A.R. 188 (C.A.).

of review which will be applied; and whether the reasons for judgment indicate that the trial judge addressed all issues in a thorough manner.[121]

[280] During consultations there was support for having security for costs in appeals.

POSITION OF THE COMMITTEE

[281] The Committee is of the opinion that the case law relating to Rule 524, particularly its interplay with Rule 593(1.1), is adequate and that the case law should not be codified in the rules. In particular, the reverse onus created by the "special circumstances" test, followed by the "just and reasonable" test, is adequate and appropriate.

[282] The Committee discussed whether the rule should be left in the Appeals section of the rules, or moved into the Security for Costs section. It was agreed that Rule 524 should be retained in the Appeals section, but that reference to this rule should be made in the general Security for Costs section.

ISSUE No. 29
Are the technical requirements for security for costs in Rules 594 and 596-599 adequate?

[283] Rules 594 to 599 prescribe several technical requirements for security for costs applications.

> 594 The application for security may be made at any time after the service of the statement of claim and shall be supported by an affidavit of the defendant or his agent, who can speak positively as to the facts, alleging that there is a good defence to the action on the merits and specifying the nature thereof.
>
> 596 The order
>
> (a) shall require the plaintiff to furnish such security as the court directs within two months or such other time as may be specified in the order, and
>
> (b) shall state that, until the security is given, all further proceedings in the action are stayed, and

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[121] *Ellis*, *supra* note 117 at 128.

(c) shall state that in default of the security being given the action is dismissed without further order, unless a court on special application otherwise directs.

597 Where the security is given by bond, it shall unless the court otherwise directs be given to the party or person requiring the security.

598 The amount of security may be increased or diminished from time to time.

599 Where money has been paid into court as security for costs, it may be paid out and a bond filed for security for costs may be handed out for suit or cancellation, without order upon the written consent of the solicitors.

A great deal of case law has developed around these rules, but much of it is more substantive than procedural.

[284] The justification behind Rule 594 is that security for costs should not be ordered unless the court is satisfied that there is a defence to the plaintiff's case.[122] The defence must be more than simple denial of the plaintiff's allegations; there should be factual allegations which substantiate the defence.[123] Otherwise security for costs would essentially be mandatory once it is shown that a plaintiff falls within any of the grounds in Rule 593(1). With respect to timing issues in Rule 594, though security for costs applications should be made in a timely fashion, they need not be made immediately. If applications are made later in the action, the standard practice is to deny security for steps incurred prior to the application unless an order is made under Rule 598.[124]

[285] Rule 594 requires that the deponent swear there is a good defence on the merits. This may be done by referring to allegations of fact in the statement of defence (if the defence is complicated).[125] Where there are multiple defendants seeking security for

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[122] *Riggins v. Harvard* (1981), 34 A.R. 593 at paras. 15-20 (Q.B., Master), citing *College Brand Clothes Company Ltd. v. Brown*, [1928] 1 W.W.R. 778 (Alta. C.A.).

[123] *Ibid.* at para. 17, with reference to *Rundle Maintenance Ltd. v. Stevens* (1977), 4 A.R. 321 at 323 (Dist. Ct.)..

[124] See, for example, *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)* (1994), 153 A.R. 288 (Q.B.).

[125] *Farley v. Alberta Hospital Association* (1985), 60 A.R. 138 (Q.B., Master); *Salverda v. Kanesco Holdings Ltd.* (1985), 64 A.R. 136 (Q.B., Master).

costs, each must swear its own affidavit, or one must expressly do so as agent for the other.[126] Hearsay is permitted in affidavits supporting security for costs applications.[127]

[286] Security for costs must not exceed party-party costs.[128] The amount of security for costs is discretionary; extraordinary expenses (such as anticipated expert fees) may be awarded if there is sufficient evidence to show that such expenses are justified.[129]

[287] The court has discretion under Rule 596 to extend the specified time for giving security; it also has discretion to refuse to order the stay or dismiss the action if security is not posted.[130] Rule 596 also presents an issue in regard to certain recommendations that have been made, in the context of the Rules Project, regarding mandatory timetabling of actions.[131] If a standard term of an order for security for costs is that all proceedings are stayed until the security has been posted, this could result in frustration of the timetables, and further delays.

[288] Rule 598 allows parties to apply to have existing security for costs orders varied from time to time. The Calgary Masters noted that this rule is often invoked to permit a party to reapply to increase the amount of costs after discovery if it appears that the matter is actually going to trial. Where the allowance of increased security close to trial will prejudice a party who has proceeded on the basis of the original order, a new order is unlikely to be granted.[132]

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[126] *Sprung Enviroponics Ltd. v. Calgary (City)* (1990), 72 Alta. L.R. (2d) 237 at 243 (C.A.) [*Sprung*].

[127] *Ibid.* at 241-242.

[128] *Crothers v. Simpson Sears Ltd.* (1988), 59 Alta. L.R. (2d) 1 (C.A.) [*Crothers*].

[129] *Sprung*, *supra* note 126 at 246-247.

[130] *Crothers*, *supra* note 128 at 14.

[131] Alberta Law Reform Institute, *Management of Litigation* (Consultation Memorandum No. 12.5) (Edmonton, Alberta: Alberta Law Reform Institute, April 2003).

[132] *Polansky Electronics v. AGT Ltd.* (1999), 245 A.R. 97, 1999 ABQB 385.

POSITION OF THE COMMITTEE

[289] The Committee believes that the case law addressing the technical requirements of orders for securities for costs addresses a majority of foreseeable issues and does not need to be codified. The present Rules 594 to 599 are appropriate, subject to amending the language to be "party-neutral" to reflect the proposal that security for costs be available against any party.

[290] The effect of a stay order on mandatory timetables could be dealt with as part of the security for costs order if ongoing delay was an issue, or a stay could also apply to the timetable to the extent that they are intended to outline proceedings. The Committee seeks input from the legal profession on this issue.

[291] The remedy of dismissal of a claim, as provided for under Rule 596, will also require amendment to work within the proposed scheme. This is because, where a plaintiff seeks a security order against a defendant, it would be nonsensical to suppose that the plaintiff would want their own action dismissed if the defendant did not comply with the order. It may be that the more appropriate remedy would be to strike the claim, where the defaulting party is the plaintiff, or strike the defence, where the defaulting party is a defendant or third party. Again, input from the legal profession is sought on this point.

CHAPTER 6. COSTS ON OFFERS OF SETTLEMENT PURSUANT TO THE RULES OF COURT (RULES 166-174)

[292] Rules 166 to 168 allow a defendant to pay money into court in satisfaction of a claim of the plaintiff, or offer to surrender a counterclaim, or both. Rules 169 and 170 allow either a plaintiff or a defendant to make a formal offer of settlement. If the other party does not accept the sum paid, the counterclaim proposed for surrender, or the formal offer, special costs consequences follow.

[293] If a plaintiff recovers a judgment but does not recover more than the defendant offers under Rule 166 or Rule 169, the defendant is entitled to an award of costs under Rule 174(1), that is, the defendant will be exonerated from the costs they would otherwise have had to pay and will also recover a set of costs from the plaintiff. Under Rule 171(1.1), if the plaintiff's claim is dismissed entirely, the defendant will receive double costs, except for disbursements. If a plaintiff makes an offer under Rule 170 and recovers a judgment for more than the amount of the offer, they will be entitled under Rule 174(2) to an award of double costs, except for disbursements. The awards under Rule 174 are mandatory, "unless for special reason".

[294] Rule 174 does not require an award of solicitor-client costs to be doubled, but Rule 174(2.1) provides that the court has a discretionary power to award costs exceeding solicitor-client costs.

ISSUE No. 30
Are the costs consequences of formal offers appropriate or are they too severe?

[295] In a previous Consultation Memorandum, the Early Resolution of Disputes Committee expressed support for the regime of formal offers currently in place but left the detailed consideration of that regime for a later Consultation Memorandum.[133] This is that Consultation Memorandum.

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[133] Alberta Law Reform Institute, *Promoting Early Resolution of Disputes by Settlement* (Consultation Memorandum No. 12.6) (Edmonton, Alberta: Alberta Law Reform Institute, July 2003).

[296] The purpose of the formal offer rules is to encourage settlement and to reward parties for making reasonable and sensible settlement offers, and to penalize parties who have rejected such proposed settlements. In *Forster v. MacDonald*[134] the Court of Appeal noted that:

> Rule 174(2) is not be to frittered away, for its whole purpose is to encourage settlement. The last thing that our crowded courts need is uneconomical litigation, such as trials or appeals where the difference between the parties' positions is small, even negative.

[297] In addition to encouraging settlement, admittedly there is a punitive aspect to the formal offers rules: the unsuccessful party must bear the consequences of failing to accept a reasonable offer. A concern with this is that these consequences will apply to litigants who represent themselves, even though they may not be familiar with the rules of procedure.

[298] The possibility that costs decisions may have a "chilling" effect on litigation has been considered in several recent cases:

> ...although it is possible that prospective litigants could be inhibited from bringing forward matters for litigation, **given the purpose of Rule 174**, this may not be completely undesirable. In other words, Rule 174 forces litigants to seriously consider offers of settlement. If a party rejects what turns out to be a reasonable offer, then it must face the consequences. Rather than having a chilling effect on legitimate litigation, **Rule 174 is intended to have a chilling effect on frivolous or otherwise unnecessary litigation**. [emphasis added][135]

Position of the Committee

[299] It was generally agreed that the costs consequences already established in relation to formal offers, while severe, were not too draconian. The costs consequences serve a purpose, even where a double costs order results in over-indemnification. Committee members felt that it is appropriate for double costs orders to be mandatory as this encourages realistic approaches to litigation.

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[134] (1995), 178 A.R. 98 at para. 5 (C.A.).

[135] *Jama v. Bobolo* (2002), 311 A.R. 362 at para. 31 (Q.B.) [*Jama*].

ISSUE No. 31
Should guidance be given as to what constitutes the "special reason" for which the court may choose not to apply the costs consequences of the formal offer rules?

[300] In *Vysek*, the court noted that "special reason" is not defined in the rules and that the Court of Appeal had "recognized the difficulty in laying down a general test for what constitutes a special reason."[136] "Special reasons" have not been found in cases where the amounts recovered and offered are close or the same,[137] or where such an award would have the effect of depriving a plaintiff of the benefit of litigation. In another case, a "deliberate course of conduct to financially cripple" the other party was found to be a "special reason,"[138] as was the making of a "complex and conditional" offer[139] and a delay of 15 years in prosecuting a case.[140] The fact that a party entitled to receive double costs may be receiving more than they spent on the litigation is not necessarily a "special reason" to reduce a costs award.[141]

POSITION OF THE COMMITTEE

[301] The Committee considered whether the requirement of "special reason" for refusing to award costs as provided in the compromise rules unduly limits the court's discretion when considering the effect of formal offers. The Committee's view is that the body of law that has developed on the interpretation of "special reason" is adequate and no changes need be made.

[302] The Committee feels that broadening the court's discretion by permitting expressly alternative consequences, such as awarding solicitor-client costs or some

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[136] *Vysek v. Nova Gas International* (2001), 298 A.R. 334 at para. 11 (Q.B.), citing *Mackie v. Wolfe* (1996), 184 A.R. 339 at para. 53 (C.A.).

[137] *Jones v. Trans America Life Insurance Co. of Canada* (1996), 184 A.R. 120 (C.A.).

[138] *Morris v. Hunt Morris & Associates (1982) Ltd.* (1987), 78 A.R. 96 (Q.B.).

[139] *Rosin v. Rosin* (1994), 162 A.R. 161 (C.A.).

[140] *Allen v. Allen*, [1996] A.J. No. 794 (C.A.).

[141] *Jama*, *supra* note 135 at para. 20.

other lump sum, would only create uncertainty and confusion in the application of the rules, and thus should be avoided.

ISSUE No. 32
Should any changes be made regarding the scope and necessary wording of settlement offers that may be made under the existing rules?

[303] Overall, it was felt that the existing rules were well understood, but that perhaps some additional direction as to contents of a valid offer might be added. Sometimes offers are made in such a general manner that it is difficult to interpret whether the costs rules are triggered. It is established law that in order to attract double costs, an offer of compromise must be genuine.[142] However, it is not always easy to determine whether an offer qualifies as "genuine". The courts have held that a $1 offer, combined with an offer to forego a cross-appeal, is a genuine offer, as it offers a valuable concession.[143] In a situation where liability was contested and the defendant ultimately was successful in having the case dismissed at trial, a $1 offer was held to be a bona fide offer, in part because it included a waiver of costs incurred to date.[144]

[304] In some cases, drafting an appropriate offer which will effectively trigger the costs provisions takes a great deal of time and thought. Specifically, it was suggested that an offer, to be valid, must specify who is making the offer, who can accept the offer, and whether interest and costs are included in the offer.

[305] Members of the Committee agreed that conditional offers, so long as they were capable of acceptance, would not invalidate a formal offer, and would lead to the double costs consequences. In order to be capable of acceptance, conditional offers should be clear as to their terms.

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[142] *Budget Rent-a-Car of Edmonton Ltd. v. Security National Insurance Co.* (2001), 277 A.R. 305, 2001 ABCA 71 at para. 9 [*Budget*]; *Partec Lavalin Inc. v. Meyer* (2002), 303 A.R. 385 at paras. 7, 8, 2002 ABCA 114.

[143] *Budget, ibid.* at para. 10.

[144] *Jama, supra* note 135 at para. 19.

[306] We propose that the rules should highlight the importance of an offer of judgment by requiring the inclusion of warnings about the cost consequences of accepting or refusing to accept an offer of compromise within the appropriate time limit. Some lawyers already follow the practice of providing an information statement. Adding a requirement to the rules or forms would make the practice uniform.

POSITION OF THE COMMITTEE

[307] The Committee felt that no changes were needed to clarify what constitutes a "genuine offer," as this matter has been clarified through a developing body of case law.

[308] The rules should require parties to address who is making the offer, to whom the offer is being made, whether or not interest is included and to what date, and whether or not costs are included and to what date.

[309] The rules should require that an offer of judgment include a warning about the cost consequences of accepting or refusing to accept an offer of compromise within the appropriate time limit.

[310] The Committee suggests that the rules specify that conditional offers should be permitted and should attract the same costs consequences as other offers under the compromise rules. To be capable of acceptance, conditional offers must be clear as to their terms and must be capable of acceptance.

ISSUE No. 33
Should a formal procedure be provided for acceptance of an offer under the compromise rules?

POSITION OF THE COMMITTEE

[311] The Committee is concerned about ensuring the effectiveness of an accepted offer under the compromise rules. It proposes that a formal mechanism for accepting offers should be introduced in the form of a "Notice of Acceptance". It asks for comment as to whether the notice should be attached to a formal offer, so that the party accepting the offer, particularly a self-represented litigant, need only sign and date the acceptance.

ISSUE No. 34
Should any changes be made to the timing of offers under the existing rules?

[312] Formal offers can be made at any time before the trial commences. It is not uncommon for formal offers to be made very shortly before trial, leaving very little time for the other party to consider the offer.[145] Until recently, Rule 169(3) provided that a defendant might withdraw an offer after 45 days, which implied that they could not withdraw the offer sooner. Under a recent revision to Rule 169(3),[146] a defendant may withdraw an offer "with leave of the Court, on notice to the plaintiff, in special circumstances". The parallel provision in Rule 170(5), that a plaintiff may withdraw an offer after 45 days, remains as it was.

[313] A formal offer is not invalidated by a counter-offer, so in effect, the rules create an exception to the general principles of contract law for the purposes of the compromise rules.[147]

POSITION OF THE COMMITTEE

[314] The Committee does not suggest that a time limit for making a formal offer be imposed. The Committee was of the view that the 45 day minimum offer period should be retained, but notes that the recent revision of Rule 169(3) indicates that a policy of limited escape has been decided upon for offers by defendants, though not for offers by plaintiffs.

[315] The Committee is of the view that an offer under Part 12 could properly set a termination date after the expiration of the 45 days.

[316] The Committee does not feel it is necessary to address the effect of counter offers in the formal offer rules.

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[145] In *Millott Estate v. Reinhard* (2002), 322 A.R. 307 (Q.B.), the plaintiffs were awarded double costs on the basis of an offer made on the morning of the trial, based on a discussion of previous decisions.

[146] Alta. Reg. 238/2004.

[147] *Collins v. National Life Assurance Co. of Canada* (1995), 174 A.R. 206 at 208 (C.A.).

ISSUE No. 35
Should the rules allowing a defendant to offer settlement by paying money into court be retained or repealed?

[317] Under Rule 166 a defendant may pay money into court in satisfaction of a plaintiffs' claim. Rule 167 permits a plaintiff to accept these amounts in satisfaction of that person's claim. If the plaintiff does not accept the offer, the money is returned to the defendant pursuant to Rule 168. Payment of money into court under Rule 166 has become extremely rare as most litigants prefer the formal offer rules.

POSITION OF THE COMMITTEE

[318] The Committee is of the view that Rules 166 to 169 are archaic and unnecessary in light of the formal offer rules.

ISSUE No. 36
Should the compromise rules be amended to specifically address situations involving more than one plaintiff, more than one defendant, or third parties?

[319] Although the formal offer rules do not directly address multiple parties, various situations arising in matters involving more than merely one plaintiff and one defendant have been addressed through the common law. Although the rules do not mention third parties, or subsequent parties, it has been held that the compromise rules can be used by third parties.[148] Circumstances in which multiple defendants serve offers have also been addressed. If each defendant has served an offer each defendant will be entitled to double costs if the offer is successful.[149]

POSITION OF THE COMMITTEE

[320] The Committee proposes that third parties should be permitted expressly to make formal offers and obtain the benefit of the formal offer rules. The Committee does not see any need to make special provision for situations involving multiple plaintiffs or defendants.

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[148] *Canada Trustco Mortgage Co. v. Karpa* (2001), 302 A.R. 173, 2001 ABQB 734.

[149] *Edmonton Airports*, *supra* note 41.

ISSUE No. 37
Should family matters, estates matters or actions with respect to any other subject matter be excepted from the compromise rules?

[321] The courts have sometimes declined to apply the double costs rule in family law matters where an offer has been made but no monetary issues were involved.

POSITION OF THE COMMITTEE

[322] While the Committee recognizes the difficulty in determining how the compromise rules apply to some types of family law or estate matters, its view is that it is better to leave in place the possibility that the rules apply, and have judges assess the matter on a case by case basis using the "special reason" principles.

ISSUE No. 38
Should the compromise rules apply to the final disposition of a case in a summary procedure?

[323] Some comments during consultations indicated that in the case of a summary judgment or summary trial proceeding, the court may not apply the double costs rules.[150]

POSITION OF THE COMMITTEE

[324] The Committee sees no reason why the double-costs consequences of the compromise rules should not be applied where a matter is disposed of through the summary trial procedure or dismissed by summary judgment. The compromise rules should also apply to any interlocutory applications that result in resolution, or substantial resolution, of an entire action.

ISSUE No. 39
Should any changes be made to the application of the compromise rules on appeal?

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[150] Though a review of recent case law relating to double costs awards indicates there are no reported decisions wherein such costs were refused.

[325] Rule 174 refers specifically to both the Court of Queen's Bench and the Court of Appeal. Thus, the formal costs rules appear to apply equally to appeals. Issues arise with respect to the application of the formal costs rules to appeals, such as what should happen when a party wins at trial but loses an appeal on a different point.

POSITION OF THE COMMITTEE

[326] The Committee believes that issues arising with respect to applying the formal offer rules in appellate matters should be left to the court to deal with on a case by case basis.

ISSUE No. 40
Should a party be entitled to more than full indemnification when there has been a formal offer?

[327] An award of double costs under the compromise rules may exceed the expenses incurred by the party who receives the award. A final issue arising from the formal offer rules is whether it is appropriate for a party to receive more than full indemnification when double costs are awarded under the formal offer rules.

[328] As discussed above, the purpose of the formal offer rules is to encourage settlement and to reward parties for making reasonable and sensible settlement offers, and to penalize parties who have rejected such proposed settlements. While it is generally not appropriate for a party to receive more than full indemnification through single party-party costs,[151] it is appropriate for a party to receive more than full indemnification under the formal offer rules.

[329] The court concluded in *Shillingford*,[152] that the goals of promoting settlement and punishing those who refuse reasonable offers are sufficient justification for permitting over-indemnification in a formal offer situation. Other cases affirm these conclusions,[153] noting that while there may be "special reasons" for restricting double

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[151] See the discussion in Chapter 1, Party-Party Costs.

[152] *Shiffingford, supra* note 20.

[153] See *Larson v. Garneau Lofts Inc.* (2000), 275 A.R. 165, 2000 ABQB 857; Foothills Decorating Ltd. v. (continued...)

costs to full indemnity, the mere fact that a party will receive more than full indemnification does not by itself constitute a "special reason" to deny the full amount of double costs.

POSITION OF THE COMMITTEE

[330] The Committee is of the opinion that the reasons against awarding costs that equal or exceed the expenses incurred by a litigant do not apply to the operation of formal offers. Over-indemnification due to the operation of formal offer rules does not run afoul of the principles underlying the costs regime. Formal offers are designed to have punitive consequences if reasonable offers are not accepted, and parties are aware of the potential costs when they choose to reject an offer. The Committee does not recommend any limit of the amount of costs in circumstances other than the limits prescribed by the compromise rules where a formal offer has been rejected merely on the basis that double costs will result in over-indemnification.

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[153] (...continued)
Amigo Construction Ltd., (2000), 285 A.R. 28 (Q.B.); *Troppmann v. Troppmann* (2000), 269 A.R. 148 (Q.B.); *Jama*, *supra* note 135.

CHAPTER 7. LITIGATION REPRESENTATIVES' COSTS

[331] The appointment of next friends and guardians ad litem is dealt with under Part 6 of The Rules. The only rule dealing directly with the issue of costs as it relates to litigation representatives is Rule 603:

> Where the court appoints a solicitor to be guardian ad litem of an infant or person of unsound mind, the court may direct that the costs to be incurred in the performance of the duties of the guardian are to be borne and paid by the parties or some one or more of the parties to the cause or matter in which the appointment is made or out of any fund in Court in which the infant or person of unsound mind may be interested and may give directions for the repayment or allowance of costs as the justice and circumstances of the case may require.

[332] The General Rewrite Committee has recommended that the terminology of "guardian ad litem" and "Next Friend" should be updated, and "litigation representative" used to indicate a person acting for either a plaintiff or defendant. The question of how the costs rules for litigation representatives should be updated was referred to the Costs Committee.

ISSUE No. 41

Should Rule 603 be limited in its application to solicitors appointed by the court to be guardian ad litem of an infant or person of unsound mind, or should it apply to all litigation representatives?

POSITION OF THE COMMITTEE

[333] It was agreed by Committee members that court-appointed guardians ad litem need not be solicitors, and that any costs immunity afforded in that capacity was probably so that qualified persons would agree to act for incapable defendants, so that the rule should not be limited to solicitors..

ISSUE No. 42

Should litigation guardians be required to pay or guarantee court costs

a) when acting as guardian ad litem;

b) when acting as Next Friend;

c) when acting for an infant, as opposed to an adult person of unsound mind; or

d) in any matter or only particular matters?

[334] There is conflicting authority as to whether Rule 603 mandates that a Next Friend should always be liable for costs. The Alberta Court of Appeal has stated that "[o]ne of the prime functions of a next friend is to ensure that the litigation is in the best interests of the infants, is sensible, and is well conducted. He pledges his liability to costs in that cause."[154] Other Alberta courts have found that there may be exceptions to this policy:

> Where a statutory body is compelled to act as next friend it is doubtful that it would be responsible for costs.
>
> ...
>
> The next friend's responsibility for costs appears to have developed as a matter of policy, namely that the defendant should have someone to look to for costs. Where that policy is not viable, as in the case of statutory bodies, one may deviate from the practice. As there are no Rules preventing the court from making a direction to the effect that a next friend not be personally responsible for costs, and as costs are a matter within the court's discretion, I cannot see any reason why the court would be precluded from making such an order, in the right circumstances. As I am not concerned here with the merits of the substantive application, but only with whether the court possesses the jurisdiction to make an order of this nature, I will not comment on whether such an order would be appropriate in these circumstances. I am satisfied, however, that this Court does have the jurisdiction to make such an order.[155]

[335] It appears that the costs liability of a litigation representative, whether acting for the plaintiff or the defendant, will depend on circumstances. As there is no absolute immunity from having to pay costs, a problem arises as qualified people may decline to act as litigation representatives for fear of incurring liability for the costs of litigation.

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[154] *Salamon v. Alberta (Minister of Education)* (1991), 120 A.R. 298 at para. 4 (C.A.).

[155] *Thomlinson v. Alberta (Child Services)* (2003), 335 A.R. 85 at paras. 117, 119 (Q.B.).

Rules in Other Jurisdictions

[336] In other Canadian jurisdictions that address the costs consequences of acting as a litigation guardian under the rules, three different approaches are taken.

[337] The costs rules of the Northwest Territories, Newfoundland and Nova Scotia are essentially identically to Rule 603.

[338] The rules in Manitoba, Ontario, New Brunswick and Prince Edward Island provide that:

> 1. The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the successful party's costs.
> 2. A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise.[156]

[339] Saskatchewan's Rules are quite distinct. Their Rule 50 (found in the section relating to Persons under Disability) provides that:

> 50(1) A litigation guardian shall not be liable personally for costs.
>
> (2) A litigation guardian for a minor may not receive any compensation for his or her services on behalf of the minor in the proceeding.

[340] Saskatchewan Rule 549 (in the Costs section) further provides that:

> 549 Where the court appoints a litigation guardian of a person under disability, the court may:
>
> (a) direct that the costs incurred in the performance of the duties of the litigation guardian are to be paid:
>
> (i) by the parties or one or more of the parties; or
>
> (ii) out of any fund in court in which the person under disability has an interest; and
>
> (b) give directions for the payment or allowance of costs that the court considers just.

[341] There has been no judicial consideration of Saskatchewan Rule 50. Though not specifically addressing Rule 50, there is Saskatchewan authority that unless a litigation guardian is acting improperly, they will not be held personally responsible

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[156] All of these jurisdictions mirror Ontario, r. 57.06.

for costs in order to encourage good people to act as litigation guardians.[157] The commentary under Rule 50 in the *Annotated Saskatchewan Rules of the Court of Queen's Bench* states:

> [the] Court may order otherwise under this rule, see rules 545(1) and 551. See also rule 549 re costs of a litigation guardian.
>
> Note that subrule (1) applies to all litigation guardians while subrule (2)only applies to litigation guardians of a minor. Before subrule (1), one of the purposes of requiring an infant plaintiff to sue by a next friend was to protect the defendant for costs ...
>
> Query: under what circumstances will a litigation guardian now be liable personally for costs? ... It appears from Champ, Re (1986), 47 Sask. R. 305 (Q.B.), that a litigation guardian who has no reasonable and sufficient ground to bring action and does so for his own benefit rather than for that of the person under disability would be personally liable for costs.
>
> See Champ, Re (1986)47 Sask. R. 305 (Q.B.): the court wishes to encourage people to come forward as litigation guardian for the purpose of obtaining its aid on behalf of parties incapacitated to sue for themselves - this seems to be the philosophy behind subrule (1).[158]

POSITION OF THE COMMITTEE

[342] The Committee was generally agreed that the historical purpose for holding plaintiff representatives liable for costs was to deter frivolous actions brought by parties with influence over the claimant. It was further noted that a guardian ad litem is usually closer to being a "friend of the court" to ensure that a fair defence is put forward on behalf of an incapable party.

[343] The Committee has not reached a decision as to whether all litigation representatives should be indemnified against costs liability. The Committee seeks input from the legal community on this issue.

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[157] *Re Champ Estate (No. 2)* (1986), 47 Sask. R. 305 (Q.B.).

[158] Neva R. McKeague, *The Queen's Bench Rules of Saskatchewan: Annotated*, 3rd ed., looseleaf (Regina: Law Society of Saskatchewan, 2001) at 6-33.

CHAPTER 8. PROTECTION FOR PAYMENT OF LAWYERS' ACCOUNTS

ISSUE No. 43
Should Rule 624 be retained?

[344] Rule 624 provides that "a barrister and solicitor may obtain payment in advance or take security for his future fees, charges or disbursements subject to the right of taxation". The Code of Professional Conduct deals with deposits. Other forms of security are not common, though it has been said that the expectation that the fruits of litigation will pass through the hands of the winner's lawyer and will become subject to a lien is a form of security.

POSITION OF THE COMMITTEE

[345] The Committee sees no objection to Rule 624 and thinks that it should be retained.

ISSUE No. 44
Should the rules deal with the common law solicitor's lien?

[346] A lawyer has a lien for unpaid fees over the property of the client that comes into the lawyer's possession, usually money. The lien applies to all legal fees, litigation and otherwise. It is an imperfect security. It is a right to possession only. Rule 604 provides that a set-off for damages or costs between parties may be allowed despite a solicitor's lien, and the lien has been judicially characterized as an equitable right that stands no higher than the client's right to the property and, though the client cannot by their own act derogate from the lien, it is limited by whatever rights may be exercised against the property.

[347] The nature of retaining liens was discussed in *Imperial Developments*:

> The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an incumbrance or equitable charge. It is merely passive and possessory that is to say, the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents

or other personal property of his client or former client - in the words of Sir E. Sugden in Blunden v. Desart (2) (2 Dr. & War. 418):

> '. . . to lock them up in his box, and to put the key into his pocket, until his client satisfies the amount of the demand.'
>
> It is wholly derived from, and, therefore, co-extensive with, the right of the client to the documents or other property: see the statement of Lord Cranworth L.J. in Pelly v. Wathen (3), cited by Chitty J., in Re Llewellin (4) [1891] 3 Ch. 148).[159]

[348] Retaining liens are also addressed in the Law Society of Alberta's Code of Conduct.[160] In particular, the commentary on Rule 3, Chapter 7, says that there is a general duty to decline to enforce a lien for non-payment of legal fees if the client is unable to pay and assertion of the lien would materially prejudice the client's position in any uncompleted matter. Though clients in Alberta may make applications to the court for the return of their property over which a retaining lien is being exercised, there is no mechanism in the rules that directly addresses this need.

[349] Where a contingency fee agreement is involved, the situation is somewhat complex. It has been held that the assertion of a lien for fees is inconsistent with the contingency agreement, presumably because a contingent fee is not earned until there is success.[161] However, if the client asks to have the file transferred to another lawyer, the lawyer may ask for, and is entitled to receive, an undertaking from the successor lawyer to protect the transferring lawyer, from the fruits of the litigation, to protect the transferring lawyer's claim.

[350] The lawyer's lien does apply to disbursements if the client has agreed to pay them.[162]

[351] Where money over which a lien is sought was provided to the solicitor by the client for a particular purpose or under trust conditions which are inconsistent with the

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[159] *Imperial Developments (Canada) Ltd. (Receiver of) v. Field & Field* (1988), 87 A.R. 327 at para. 8 (C.A.), citing Evershed M. Rin in *Barratt v. Gough Thomas*, [1950] 2 All. E.R. 1048 at 1053.

[160] Chapter 4, Rule 7, Commentary 3; Chapter 13, Rule 9, Commentary 9; Chapter 14, Rule 3, Commentary 3.

[161] *Law Firm v. Solicitor*, [1992] A.J. No. 1242 (Q.B.).

[162] *Ibid.*

existence of a lien (ie. where a solicitor had agreed to return funds not disbursed), no lien exists.[163] Nor can this situation be avoided by claiming set-off.[164]

Rules in Other Jurisdictions

[352] Saskatchewan is the only Canadian province to have codified the retaining or common law lien. Section 66(3) of *The Legal Profession Act* provides that:

> a member has a lien or charge for the member's proper fees and expenses in relation to all legal services performed by the member for a client against any property owned by the client that is in the member's possession.[165]

[353] Section 66(4) goes on to state that "nothing in subsection (3) overrides the exceptions to a solicitor's lien at common law." Section 66(5) provides a mechanism for the client to seek delivery of any such property.

Position of the Committee

[354] The Committee is of the opinion that the law relating to solicitors's liens should not be codified in the rules.

ISSUE No. 45
Is Rule 625 (charging orders) satisfactory?

[355] Rule 625 provides that the court may declare a barrister and solicitor to be entitled to a charge upon property recovered or preserved through any proceedings prosecuted or defended, and may make consequential orders for realizing the amount of the lien. The lien is for proper fees and disbursements in reference to the proceeding. The rule goes on to say that the charge can be defeated only by a bona fide purchaser for value without notice. The test for granting a solicitor's charge under R. 625 is established by authority:

> R. 625 lets a lawyer apply to the court and get a charging order which creates a sort of mortgage in favour of the lawyer over certain assets of the client. It is a good remedy where applicable, because it prevails over

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[163] *Jamison v. Alberta* (1987), 79 A.R. 170 (C.A.).

[164] *Canadian Commercial Bank v. Parlee McLaws* (1989), 95 A.R. 321 (Q.B.).

[165] S.S. 1990, c. L-101.

> the interests of all the persons who benefit from the lawyer's efforts, and is a secured claim which prevails over unsecured claims and collusive settlements. But this remedy only applies in fairly narrow circumstances. The lawyer must meet all these conditions:
>
> (a) The lawyer must have run or defended litigation, which may not include expropriation.
>
> (b) The lawyer's efforts in the suit must have recovered or preserved (defended) for the client the very net property sought to be charged, but that probably extends to matrimonial property suits, or suits to enforce or remove a lien, mortgage, or caveat.
>
> (c) The charge is limited to fees and disbursement incurred in the same suit which recovered or preserved this property; it cannot cover other accounts for other suits or for non-litigious work.
>
> (d) The court need not give the charge even if conditions (a) to (c) are all met, if it seems unfair to give it.[166]

[356] Rule 625 should be liberally construed.[167] The right to apply for a charging order does not confer a lien; it is a right to ask the court to intervene and exercise discretion to protect solicitors from their clients' default.[168]

[357] In Alberta, a charging order under Rule 25 attaches only to "property recovered or preserved through his instrumentality in any proceedings prosecuted or defended by him."[169] The charging lien is only available with regard to "property ... recovered or preserved" within the context of litigation ("proceedings")[170] by the claiming lawyer. The property in issue must be specific and identifiable and, in order to have been "recovered or preserved" in the proceedings, its ownership (or the right to own it) must have been in dispute. Furthermore, only the proper fees and disbursements

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[166] *Civil Procedure Handbook*, *supra* note 95 at 606. *Royal Bank of Canada. v. Laughlin* (2001), 277 A.R. 201 at para. 34; 2001 ABCA 78.

[167] *Feehan v. Pocock Floors Ltd.*, [1971] 4 W.W.R. 572 (Alta. Dist. Ct.).

[168] *Ibid.*; see also *McReady Products Ltd. v. Sherwin Williams Co. of Canada* (1986), 68 A.R. 342 (Q.B.).

[169] *Jackson Arlette MacIver & Skitsko v. Continental Bank of Canada* (1986), 70 A.R. 147 (C.A.).

[170] As stated by MacDonald, J. in *In Re Home Assurance Co. of Canada*, [1950] 1 W.W.R. 337 at 355-356 (Alta. S.C.T.D.): "In the result, it seems clear that the lien applies only for costs in cases where there was an action or a suit or a proceeding of some kind. The lien is a particular one on property recovered or preserved as a result of such action, suit or proceeding. The property is not available to a barrister and solicitor for costs incurred in other matters.". See also *White Resource Management Ltd. v. Durish* (1997), 211 A.R. 367 (Q.B.).

incurred in prosecuting or defending the action in relation to the specific property can be recovered under such a lien.

[358] The issue of specific, identifiable property is particularly problematic in contingency fee situations. It has been held that charging liens were not available in contingency situations, partly because the amount of the charge (the contingency fee) could not be ascertained until the end of proceedings and partly because the property against which the charge was sought (the eventual judgment) was not yet property.[171] In *Law Firm v. A Solicitor*, the solicitor was ordered to give the firm an undertaking to share the fees when they became payable at the end of the contingent litigation. The firm was entitled to assert a lien against its disbursements on the contingency files, except where to do so would have interfered with the action, because the disbursements were specific whereas the fees in an unresolved contingency claim would not be determined until settlement or judgment had been reached.

[359] By contrast, in *A Client v. A Law Firm*[172] the scope of a charging order was extended to situations where a contingency agreement had been in effect and the client changed lawyers before securing judgment on the claim. This decision follows the British Columbia decision in *Doyle v. Keats*,[173] where the court found that a charging order may be made against property not yet ascertained.

Rules in Other Jurisdictions

[360] A majority of Canadian jurisdictions have rules, or other statutory provisions, that allow for a charging order.[174]

[361] In the analogous British Columbia[175] and Saskatchewan provisions relating to charging orders, "proceedings" include tribunals. In New Brunswick, the charging

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[171] *Law Firm v. Solicitor*, *supra* note 161.

[172] (1999), 254 A.R. 169 (Q.B.).

[173] (1990), 46 B.C.L.R. (2d) 54 at para. 17 (S.C.).

[174] Except the Manitoba and Federal Courts.

[175] See *Legal Profession Act*, RSBC 1998, c. 9, s. 79; *The Legal Profession Act*, *supra* note 165, s.66, respectively.

order has been expanded so that it is available to a solicitor who "represents a client in a proceeding before a court or tribunal, *or in a legal transaction* ...".[176] Thus even a solicitor working on a corporate matter can, apparently, secure a charging order in New Brunswick. New Brunswick is the only province which makes provision for a solicitor's charging order outside of judicial, or quasi-judicial, "proceedings".

[362] Prince Edward Island and Ontario have a simplified process in their rules whereby a party who is having a file transferred to a new lawyer can apply, on notice to the former solicitor, to determine whether and to what extent the former solicitor has a right to a solicitor's lien.[177] This gives increased access to justice to the client, in that there is a method of transferring a file without trust conditions (that often need to be negotiated, at length) with the attendant delays.

POSITION OF THE COMMITTEE

[363] Rule 625 should be retained as regards charging orders, though it should be clarified to expressly give lawyers transferring a file the right to apply for a charging order under Rule 625 even in contingency matters. Wording similar to Ontario's Rule 15.03 should be incorporated that allows clients a method of having a file transferred even if the lawyers cannot agree on the terms.

ISSUE No. 46
Is Rule 626 adequate?

[364] Rule 626 provides that lawyers may not enter default judgment against clients for fees without court approval:

> 626 An action for costs incurred to a barrister and solicitor may be brought but
>
> (a) no judgment shall be entered on default, and
>
> (b) no costs of such action shall be allowed,
>
> except upon the order of the court that may direct taxation of the costs.

[365] The rationale behind Rule 626 is that:

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[176] *Law Society Act*, S.N.B. 1996, c. 89, s. 94.

[177] Prince Edward Island and Ontario, r. 15.03.

> Although the rule is rather unhappily worded, it has been generally interpreted in the Court of Queen's Bench as referring to actions brought by lawyers to recover legal fees. The rule, for reasons of public policy, prohibits a solicitor from obtaining judgment in Queen's Bench for his legal account by default without a court order...[178]

The court has indicated that it would be useful to always include a copy of the bill with the application:

> It is true that not every account need be taxed. However, a judge cannot dispense with taxation of an account he has never seen. It seems to me elementary that a copy of the account should accompany an application to enter judgment. Furthermore, I think the very least the solicitor can do is to prepare his bill showing all the detail required under Rule 645.[179] ...
>
> Because a solicitor is an officer of the court, the Court of Queen's Bench and the courts which preceded it have never allowed a solicitor to obtain a judgement for his legal fees against a client, even one who is in default, without being satisfied that the account is fair and reasonable (see Rule 613). After examining a lawyer's account a Queen's Bench judge either orders the bill taxed or dispenses with a taxation as he sees fit. It has never been the practice in the Court of Queen's Bench to insist that a solicitor have his account taxed in every instance before judgement is entered.
>
> ...
>
> Referring again to Rule 626, it is important to note that the rule is directed to the Clerk of the Court of Queen's Bench Court. The purpose of the rule is to prohibit the Clerk from entering judgment by default when a solicitor has sued for legal fees. It creates an exception to the main rule which permits the Clerk to enter a default judgment in a case involving a claim for a debt or liquidated demand upon the claimant satisfying the Clerk proper service has been made and that the defendant has not filed a statement of defence or demand of notice.[180]

POSITION OF THE COMMITTEE

[366] For the reasons given in the authorities cited, Rule 626 should be retained.

ISSUE No. 47
Are Rules 622 and 623 adequate?

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[178] *Crowe, supra* note 84 at para. 8.

[179] *Fowle, Todd & Co. v. Klassen* (1980), 31 A.R. 494 at para. 5 (Q.B.).

[180] *Crowe, supra* note 84 at paras. 9, 12.

[367] The Rules currently provide:

> Costs of solicitor acting as trustee etc.
>
> 622 Any barrister and solicitor who is a guardian, committee, mortgagee, executor, administrator or trustee is entitled as against the estate or fund, or as against the mortgage or estate, to make the same charges for services performed by him as a barrister and solicitor for or in connection with the estate or fund or mortgaged property as might have been payable out of the estate or fund, or be chargeable against the mortgaged estate, if the barrister and solicitor had been employed by some other person acting in that capacity.
>
> 623(1) No costs otherwise payable out of or chargeable against any trust estate, trust fund or mortgaged property, shall be so paid as against any person interested therein, unless
>
> (a) the costs have been taxed, or
>
> (b) the interested person is sui juris and has consented to the payment, or
>
> (c) the court has fixed the amount of, and directed the payment or charge.
>
> (2) This Rule does not apply to clients' funds held by a solicitor in the solicitor's trust account.

[368] Rule 622 allows a barrister and solicitor to make charges in two classes of cases as if employed by some other person. The first class consists of cases in which the barrister and solicitor is a guardian, committee, executor, administrator or trustee, and Rule 622 entitles the barrister and solicitor to make charges against the estate or fund involved. The second class consists of cases in which the barrister and solicitor is the mortgagee. Rule 623 provides that the charges shall not be paid unless the costs have been taxed, or the interested person is *sui juris* and has consented, or the court has fixed the amount of, and directed, the payment or charge. Rule 623 excludes from its application clients' funds held by a solicitor in the solicitor's trust account.

POSITION OF THE COMMITTEE

[369] The Committee does not propose to make any changes in the policy of Rules 622 and 623. As the wording of Rule 622 is confusing where it provides that the mortgagee barrister and solicitor is entitled to make the charges "as against the mortgage or estate," the Committee proposes that the wording of the rule should be changed to make it clear that the charges may be made against the mortgaged property or against the mortgage loan. The wording should tie the two sections together.

CHAPTER 9. COURT AND OTHER FEES

ISSUE No. 48
Are court fees properly part of the rules?

[370] In Alberta court fees are found in Schedule E of The Rules. Ontario and Saskatchewan have removed fees from the rules and placed them into regulations, thus giving the government direct responsibility for them as well as the ability to adjust them from time to time without review by a judicial rules committee.[181] It is to be noted that under this regime, Ontario has greatly increased the amount of fees charged for things such as filing a Statement of Claim, and has also increased the number of steps in an action which must be paid for at the courthouse. This suggests that Ontario is proceeding on a cost recovery basis.

POSITION OF THE COMMITTEE

[371] As the Committee is concerned that removing the court fee schedule could lead to access to justice issues, it is of the view that court fees should remain part of The Rules.

ISSUE No. 49
Should fees be charged for steps other than commencing an action or setting a matter for trial?

[372] Presently in Alberta there is a $200.00 charge for commencing an action, regardless of the manner in which the action is commenced. Item 1 of Schedule E provides that this includes all subsequent filings in the action (with the exception of Certificates of Readiness, Notices of Appeal, and Appointments for Taxation).

[373] There are both advantages and detriments to having additional charges for steps in an action. Presumably imposing additional charges for filing defences, counterclaims and motions would deter parties from pursuing frivolous defences,

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[181] In Ontario, most of the court fees are found in the regulations under the *Administration of Justice Act*, R.S.O 1990, c. A.5, rather than in the rules (although notably, Tariff A, "Solicitors' Fees and Disbursements" is in the rules).

counterclaims and motions, which should be encouraged. However, additional charges would also increase the already high cost of litigation, which can create problems with access to justice.

Rules in Other Jurisdictions

[374] The fee structure in British Columbia is quite different from that in Alberta. In addition to the initial $200.00 fee for filing a claim, there is a $25 fee for filing a Statement of Defence (regardless of whether it is a defence to the primary claim, counterclaim, or Third Party Notice). A $200 fee applies for filing a counterclaim.[182] There is also a fee of $60 for each interlocutory application filed throughout the duration of the action.

Position of the Committee

[375] The Committee has concerns with the high cost of litigation and its effect on access to justice. It is of the view that no additional filing fees should be levied for steps in an action apart from those that have already been assessed.

ISSUE No. 50
Are the filing and administrative fees charged (including fees for copying, searching, certification, et cetera) appropriate?

Comments from the Legal Community

[376] One commentator noted that it seemed unfair for the courthouse to charge a dollar a page for photocopying while the taxing officer only allows counsel to charge 25 cents for the same service.

Position of the Committee

[377] The Committee was of the unanimous opinion that the levels of the current filing and administrative fees were appropriate and that, if any changes were to be made, they should be made by the Rules of Court Committee.

ISSUE No. 51
Should Alberta charge trial fees?

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[182] British Columbia, *Supreme Court Rules*, Appendix C.

[378] Some other Canadian jurisdictions have a fee specific to trial, including British Columbia and the Federal Court.

[379] British Columbia requires a fee of $156 for a half day; $312 per day for the first 5 days; $416 per day up to 10 days; and $624 per day thereafter. The Federal Rules do not require the payment of a fee for the first three days of a trial or reference. Thereafter, they require fees of $150 per day for trials and $75 per day for references, to be divided among all participating parties.

Position of the Committee

[380] The Committee feels that charging per diem trial fees would adversely affect access to justice. The Committee is of the view that there should be no specific charge in Alberta for trial time.

[381] Comment is requested on the requirement in Rule 241 that a party who requests a jury trial pay the expenses of the jury, and that if the deposit required by the clerk is not made, the trial will be before a judge alone.

ISSUE No. 52
Are witness and jurors' fees appropriate?

[382] Witness fees are currently set in Schedule E, Number 3. Witnesses are entitled to $10.00 for each day spent going to, staying at, or returning from the place of trial for the first week of the trial, and are entitled to reimbursement for travel expenses. "Reasonable" accommodations are only paid if the witness does not reside within a reasonable commuting distance.

Rules in Other Jurisdictions

[383] In British Columbia witnesses other than a party, or current director or officer of a party, are allowed in addition to $20 per diem "a reasonable sum ... for the time employed and expenses incurred by the witness in preparing to give evidence, when that preparation is necessary." In Ontario, an ordinary witness is paid $50 per diem. The Federal Rules allow for the payment, in lieu of the tariff amount of $20 per day for an ordinary witness or $100 per day for an expert of "a greater amount equal to the expense or any loss incurred by the witness in attending a proceeding."

Comments from the Legal Community

[384] There were several comments on the issue of witness fees. Several noted that witness fees should be increased and that conduct money is inadequate. Another comment was that witnesses could be reimbursed for their lost time. It was also noted that a virtual courtroom would be in the interests of justice where witnesses live more than a few hours' drive away or where they are professionals where travel time would require the payment of a large sum of money to have them attend. (For example, there are dental surgeons that charge up to $5,000.00 per day to be away from their lucrative practices.

Position of the Committee

[385] The Committee felt that in general witness and juror fees are too low. The Committee considered the viability of introducing elements from the Ontario or British Columbia approaches (payment for preparation time, actual loss in lieu of the per diem rate) into Alberta. Another suggestion was that ordinary witnesses should, perhaps, be paid at a rate equal to the hourly minimum wage in the Province for each hour in attendance at trial. As no agreement could be reached, the Committee seeks the legal profession's comments on whether witness or juror fees are appropriate or too low. The Committee also seeks comments as to whether a more appropriate fee would be based on minimum wage for each hour spent at the courthouse attending as a witness or juror, and whether travel time should be chargeable by witnesses and jurors.

[386] With regard to travel and meal expenses, it is suggested that reimbursement on these matters should be brought in line with the amounts available to government employees travelling on business. It was also agreed that where a witness must travel over 200 km, the rules should more specifically provide for repayment of actual airfare.

[387] The Committee is of the view that witnesses should not be reimbursed for preparation time, but would like comment on this as well.

ISSUE No. 53
Are the expert witness fee provisions adequate?

[388] Currently Schedule E provides that professional witnesses are entitled to a $75.00 per diem fee in addition to travel and subsistence expenses. Of course, expert witnesses are invariably paid a fee by the party requesting the service, which will exceed $75.00 per day.

Rules in Other Jurisdictions

[389] British Columbia does not include a provision regarding payment of attendance fees to experts. The Federal Rules provide that in lieu of the $100 per day expert attendance fees, "a party may pay the expert witness a greater amount established by contract for his or her services in preparing to give evidence and giving evidence." This is, of course, the usual practice in Alberta (at least as regards party-and-party costs). This may be why BC does not specify a daily or hourly expert witness fee, in recognition of the fact that expert witnesses, not being compellable (as experts), are paid whatever hourly or daily rate they happen to charge.

Position of the Committee

[390] The Committee is concerned that in practice, successful parties may seek reimbursement of the $75 per day fee currently provided for payment to experts under Schedule C while in attendance at proceedings in addition to whatever amount has actually been disbursed to them by the retaining party. It is suggested that the schedule be amended to reflect actual practice and provide for payment of experts "in an amount established by contract for his or her services in preparing to give evidence and giving evidence," as is the case under the Federal Rules.

[391] The Committee proposes that expert witness fees should not be included in Schedule E, as experts are almost invariably paid a much higher fee to attend court. Parties should not be able to obtain an automatic $75 fee per day for each expert in addition to recovering their stipulated fees.

ISSUE No. 54
Should provision be made in the rules for interpreters' fees as taxable costs, and, if so, at what rate and for services in what circumstances?

[392] Until 2000, Schedule E provided for interpreters' fees of $15.00 per hour, but the Schedule was amended in that year to remove all reference to interpreters and

interpreters' fees (though the Fees and Expenses for Witnesses and Interpreters Regulation, Alta. Reg. 123/1984 provides for interpreters' fees of $15.00 per hour while in attendance at criminal and Child Welfare Proceedings, plus expenses.). In 2000, references to interpreters were then deleted from Schedule E (Regulation 252/00). It is understood that interpreters' fees of $35.00 per hour have been taxed recently, but it is not clear whether or not an interpreter's fees can be taxed for services outside actual proceedings.

[393] Comment is sought as to whether the rules should provide for including interpreters' fees in taxable costs, and, if so, at what rate and for services in what circumstances.

ISSUE No. 55
Should the rules address waiver of fees?

[394] Currently the Rules provide that court filing fees will be waived in certain circumstances:

(i) fees for court searches where carried out by peace officers in the course of their duties;[183]

(ii) matters for which a Legal Aid certificate has been issued;[184]

(iii) applications for restraining orders that do not seek any other corollary relief.[185]

[395] The Rules do not provide a general provision under which the court may waive court fees, and the presence of these specific provisions may militate against an interpretation that would give the court such a power.

[396] In the United States, a litigant may apply to proceed *in forma pauperis*, that is, "as an indigent who is permitted to disregard filing fees and court costs."[186]

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[183] R. 586.05.

[184] R. 586.1.

[185] R. 586.2.

[186] Spencer G. Park, Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner *Pro Se* Litigation in the United States District Court for the Northern District of California in San Francisco"

(continued...)

[397] It has been argued that the provisions of a 1495 English statute, *A Means to Help and Speed Poor Person in their Suits* (1495) Henry VII c. 12, which provided for a waiver of fees owed to the Crown, supports a general waiver. It has also been argued that there is

> "an unwritten constitutional principle that reflects Canada's 'commitment to an orderly and civil society in which all are bound by the enduring rules, principles, and values of our Constitution as the supreme source of law and authority.'"[187]

It may also be argued that the Queen's Bench has inherent jurisdiction to waive court fees.

[398] The question is whether it is desirable to have an express provision in the rules permitting the court to waive court fees where a party proves inability to pay court fees and a claim that merits bringing before the court.

[399] Another question is whether court filing fees prevent people from pursuing meritorious claims. There are no Alberta cases dealing with the subject. Has the advent of contingency agreements displaced any need to waive court fees? As the primary court fees are to file a statement of claim and set a case down for trial, plaintiffs would be most in need of a waiver of court fees. A lawyer who takes a case on contingency may be prepared to front these fees.

[400] Provincial Court clerks enjoy a wider discretion in cases where a party is experiencing undue financial hardship. In the Provincial Court, the clerk has an express power to waive fees.[188] The process involves filing a Statement of Finances to establish impecuniosity and the waiver applies only to commencement document fees.

[401] The Committee was also aware of an initiative to create a similar power in the Court of Queen's Bench allowing a judge to waive commencement fees in cases of established impecuniosity.

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[186] (...continued)
(1977) 48:4 Hastings L.J. 821.

[187] *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 at para. 75 (S.C.). See also *Pearson v. Canada* (2000), 195 F.T.R. 31, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 459.

[188] *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 9(1), as am. by R.S.A. 2000, c. 16 (Supp.), s. 5; *Provincial Court Fees and Costs Amendment Regulation*, Alta. Reg. 216/2002, s. 1.1.

POSITION OF THE COMMITTEE

[402] The Committee invites comment on whether the rules should expressly give the court jurisdiction to waive court fees, and, if so, whether the rules should outline the factors on which the court should exercise that jurisdiction, such as proof of impecuniosity and showing a meritorious case to be brought to the court.

PART II — CONTEMPT PROCEEDINGS

CHAPTER 1. INTRODUCTION

[403] Part II synthesizes the consensus of the General Rewrite Working Committee concerning the rules relating to contempt of court. While the Part raises a number of issues for discussion, it will be seen that the Committee proposes no change in those rules.

[404] The rules governing civil contempt proceedings are found in Rules 701 to 704.1 (including provisions for dealing with parties with mental disorders). Rule 366 specifically addresses disobedience by a corporation.

[405] A large part of contempt procedure is found in the common law of contempt, that is, the mix of rules emanating from the jurisprudence, the *Constitution Act* and the *Charter*. The jurisprudence conceives of a historical, inherent power of the court to control its own procedure and uphold the rule of law and constitutional law. In most cases, this jurisprudence is as, or if a conflict occurs, potentially more authoritative than the rules, even on "purely" procedural questions. Many long-standing principles in the common law of contempt need no codification in the rules.

CHAPTER 2. SPECIFIC ISSUES

ISSUE No. 56
Should the rules codify a preference against proceedings for contempt on the court's own motion?

[406] Rule 702(1) restates the power of Queen's Bench judges to initiate civil contempt proceedings. At common law, some cases have held that, in cases of contempt not in the face of the court, courts should decline to initiate proceedings except in the rarest circumstances. For the most part, the prevailing view from the common law is that immediate parties to the litigation, or the Attorney-General, are better suited to bring contempt proceedings. Should this view be codified?

POSITION OF THE GENERAL REWRITE COMMITTEE

[407] In the Committee's view, there is no need to codify this principle. Whether to initiate civil contempt proceedings on its own motion ought to remain entirely within the discretion of the judge. No other jurisdiction's rules restrict the court by restricting this discretion.

ISSUE No. 57
Should the rules specify who has standing to bring contempt proceedings?

[408] At present, none of the jurisdictions reviewed for this project have any such restriction. The Federal Rules permit "a person who has an interest in the proceeding" to bring a motion for a show cause hearing.[189] In one case, proceedings for contempt were properly initiated not only by immediate parties but by any interested party such as a witness or a complainant.[190] However, this view is not held universally among the judiciary.[191]

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[189] Federal, r. 467(1).

[190] *R. v. Froese*, [1980] 1 W.W.R. 667 at paras. 21-23 (S.C.), aff'd. (1980), 23 B.C.L.R. 181 (C.A.).

[191] Canadian Judicial Council, Some Guidelines on the Use of Contempt Powers (Ottawa: CJC, 2001) on line at <http://www.cjc-ccm.gc.ca/cmslib/general/contempt_2001.pdf> at 21-22 [*CJC Report*].

[409] Eliminating any doubt about the standing of non-parties to bring contempt proceedings might have advantages. If standing is restricted to parties only, this would reduce the risk of unexpected enforcement proceedings by a stranger to the litigation. On the other hand, exceptional circumstances may arise where such a stranger has important legal rights at stake in the compliance of a court order.

POSITION OF THE COMMITTEE

[410] As the Alberta rules are silent on the issue, the courts are left with discretion to decide questions of standing on a case by case basis, which in the Committee's view is preferable. The Committee agreed that no reforms are needed on this point.

ISSUE No. 58
Should the rules prescribe what judge may or must hear contempt proceedings?

[411] At present, the Alberta rules are silent on the question of what level of court may deal with civil contempt. There is nothing limiting the common law position, which is that all superior court judges have jurisdiction to hear proceedings related to contempt of any other judge of the superior court. The only common law restrictions lie in the public law doctrine of reasonable apprehension of bias. The Canadian Judicial Council urges judges to "refer any [contempt proceeding] matter to another judge if there is any reasonable apprehension of bias or prejudgment."[192] This may arise in a case where a judge has initiated contempt proceedings on their own motion, thus placing them in the difficult position of being both a trier and a witness in the proceedings.

[412] The Ontario Rules stipulate that all contempt proceedings must be initiated before the judge "in the proceeding in which the order to be enforced was made."[193] To the extent that it conflicts with the common law doctrines of bias as set out in the case law, such a rule would be at best controversial, if not ultimately invalid, by purporting to force a party to apply to a particular judge in all circumstances.

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[192] *Ibid.* at 4.

[193] Ontario, r. 60.11(1).

POSITION OF THE COMMITTEE

[413] In the Committee's view, Ontario's approach is not desirable. Restricting which judges can hear contempt applications unduly complicates the exercise of their discretion to decline or accept jurisdiction when allegations of bias are made. Certainly, where public law doctrines of bias require otherwise, any rules requiring a particular judge may be vulnerable to challenge. In particular, forcing the parties – especially the alleged contemnor – before a particular judge, especially the one who made the order breached, seems to be a needless fetter of discretion. Accordingly, the Committee decided that the current position on "who hears" in Alberta is best and should be retained.

ISSUE No. 59
Should jurisdiction over contempt by persons who are not parties to the proceeding in which an order is made be more explicit?

[414] At present, the Alberta and other rules under review make no distinctions between parties bound by an order and persons "bound to obey"[194] it. Both are subject to contempt proceedings. This often emerges in injunction cases, where the order enjoins specific persons or a defined class of persons from specific acts.

[415] The Supreme Court of Canada has cautioned that, to be effective, such an injunction must make non-parties specifically aware that they are bound by it as well.[195] This implies the availability of knowledge-based defences for non-parties; that is, where a party can show they had no knowledge of, nor were wilfully blind to, the terms of the order and the fact that it applied to them, they cannot be convicted of contempt.

POSITION OF THE COMMITTEE

[416] In the Committee's view, no such elaboration such as that suggested by the Supreme Court of Canada is needed for the Alberta rules. The current rules speak of contempt by "persons," not parties. This dovetails with the common law.

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[194] *CJC Report*, *supra* note 191 at 10; and *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 at 1060.

[195] *MacMillan Bloedel*, *ibid.*

ISSUE No. 60
Should the court's jurisdiction to proceed summarily and to proceed *instanter* be codified?

[417] "Summary" and "*instanter*" are used differently. Summary procedure refers to the court's power on a contempt proceeding to use a speedier process to determine whether a person is in contempt. Sir Jack Jacobs described the summary procedure as:

> ...the exercise of the powers of the court to punish or to terminate proceedings without a trial, *i.e.*, without hearing the evidence of witnesses examined orally and in open court. It does not mean that the court can be capricious, arbitrary or irregular, or can proceed against the offender or the party affected without his having due opportunity of being heard; but summary process does mean that the court adopts a method of procedure which is different from the ordinary normal trial procedure.[196]

Instanter proceedings describe a scenario where a court "cites" (charges with) a person for contempt, invites them to give an excuse, then convicts and sentences them "on the spot". That is, *instanter* proceedings are the sparsest form of summary procedure.

[418] The common law has always permitted courts to proceed summarily, and generally calls for as many procedural protections as the particular circumstances of the contempt allow. That is, the more that urgency or other factors require that a contempt proceeding occur quickly and decisively in order to maintain the integrity of the court, the less procedural protections are required. These "natural justice" rights include:

- the presumption of innocence;
- the right to apply for but not the absolute right to an adjournment in or out of custody to prepare a defence or to obtain counsel;
- the right to apply for judicial interim release;
- the right to counsel;
- the right to be informed precisely what is alleged and particulars;
- the right to cross examine witnesses, if any, but not to cross examine the judge unless he gives evidence;
- the right to give evidence or to refuse to testify, and to call witnesses;

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[196] I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Probs. 23 at 29.

- the right to make submission on guilt and punishment; and
- proof beyond a reasonable doubt.

Exigency, however, may warrant the denial of some of these protections.

[419] This accurately represents the current law in Alberta, and is similar to that across Canada. The Canadian Judicial Council also adopted this view in its 2001 report.[197]

[420] However, the recent decision of the Supreme Court of Canada in *R. v. Arradi*[198] holds that *instanter* convictions and sentencing can amount to violations of fundamental justice where no urgent circumstances justify denying the accused's basic rights.

[421] Alberta's rules make no explicit provision for *instanter* proceedings. By contrast, the British Columbia Rules expressly empower courts to proceed this way: Rule 56(5) and (6). In the Federal Court, Rule 468 provides as follows:

> In a case of urgency, a person may be found in contempt of Court for an act committed in the presence of a judge and condemned at once, if the person has been called on to justify his or her behaviour.

POSITION OF THE COMMITTEE

[422] In the Committee's view, the existence of a rich jurisprudence that combines elements of common law and *Charter* analysis seems to generally obviate the need for the re-entrenchment of its basic constituent principles in the rules. In light of the recent *Arradi* decision courts must now account for section 7 of the *Charter* in their deliberations. Still, courts retain all the power needed to balance the equities in contempt proceedings adequately. Therefore, the consensus of the Committee on this point is that no change in the rules is required.

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[197] *CJC Report*, *supra* note 191 at 2:

> We do not think decisive action, even if it requires an alleged contemnor to be taken immediately into custody, necessarily offends against the *Charter*. After all, suspects are often arrested on the spot. It must be remembered that sometimes a judge, court staff, jury, counsel and witnesses are all waiting to proceed and great inconvenience may result if, for example, a witness refuses to be sworn or to give evidence. The court may have to act before counsel for the witness is available. It will, however, seldom be necessary to proceed with the actual trial or hearing of an alleged contempt if the contemnor wishes an adjournment in or out of custody for the purpose of retaining counsel or for any other valid reason.

[198] [2003] 1 S.C.R. 280.

ISSUE No. 61
Should the rules require personal service for contempt motions?

[423] The Alberta rules contain no special service rules related to contempt proceedings. At common law, personal service is desirable, but not required, for contempt applications: *Metropolitan Life Insurance Co. v. Hover.*[199] However, the moving party has the onus of proving – and may do so with other evidence – that the accused had notice of the contempt proceedings. As stated by the Alberta Court of Appeal in *Kin Franchising Ltd. v. Donco Ltd*:

> "...motions for contempt must come to the personal notice of the respondent, and that service on the address for service is not enough. But personal service is not the only way that notice can come to the respondent. For example, if the persons at the address for service send the papers on to the respondent who actually gets them, and the court has reliable information to that effect, that suffices."[200]

[424] The common law also requires that the accused person had knowledge of the order alleged to be breached. The British Columbia Rules codify this principle, removing the need for the accused to have been served with the original order (Rule 56(10)).The Ontario and Federal Rules require personal service on contempt motions – and do not allow any substituted service – unless the court orders otherwise (Ontario 60.11(2), Federal 467(4)).

POSITION OF THE COMMITTEE

[425] In the Committee's view there is little purpose in codifying the common law position on service in contempt proceedings. The current principles remain flexible enough to respect the rights of accused contemnors to notice of the proceedings without affording opportunities for evasion through technical application of service rules. Indeed, that such evasion is precisely the mischief that may arise if service rules were codified further in Alberta. If the rules were codified along the lines of Ontario and the Federal Rules, there is a risk that real contemnors could evade enforcement via technical means. The common law is robust enough to protect their rights in the context of service of contempt materials.

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[199] (1999), 237 A.R. 30 (C.A.).

[200] (1993), 7 Alta. L.R. (3d) 313 at para. 2 (C.A.).

[426] As well, the Alberta rules' current requirement for lawyers to bring contempt motions to their clients' attention "as soon as possible after being served" (Rule 702(3)), seems appropriate to the Committee. It imposes a duty on solicitors to exercise care in contempt proceedings, although whether or not it applies after the lawyer-client relationship is ended is unclear. At the same time, it does not set up a technical defence for accused contemnors that their lawyer is responsible for their failure to respond to a show cause hearing.

ISSUE No. 62
Should there be a time line fixed for return of contempt motions?

POSITION OF THE COMMITTEE

[427] The British Columbia Rules requires that contempt motion materials be served on the accused at least 7 days before the hearing of the motion (Rule 56(7)). For the same reasons as on the issue of personal service, there is no reason to codify service obligations to such a precise extent.

ISSUE No. 63
Should the rules codify common law principles relating to mens rea, the burden of proof, or the onus of proof on contempt proceedings?

[428] Some jurisdictions have codified certain of the substantive elements of contempt procedure found in the common law. The rules remain largely silent on such issues. Because these are long-standing common law principles appropriate to application on a case-by-case basis, there is little advantage in codifying them, and a possible disadvantage in the risk of unduly fettering a court's powers by setting up technical defences for contemnors.

[429] One such element is the evidentiary burden on the accused. Where a show cause hearing is held, the accused is required to come before the court to "show cause" why he should not be held in contempt (Rule 702(2)). On a show cause hearing, the accused is still presumed innocent at law, but once the particulars of the contempt have been set out by the court, the accused bears an evidentiary burden to give an adequate explanation for the conduct. Other elements include the degree to which intent to disobey is required as an element of contempt, and the requirement of proof

beyond a reasonable doubt. The Federal Rules make explicit the latter requirement (Rule 469), but in the Committee's view this is a redundant codification.

POSITION OF THE COMMITTEE

[430] In short, the Committee resolved that the common law of contempt supplies all the necessary substantive rules, so they need not be repeated in the rules.

ISSUE No. 64
Should the rules codify the common law requirement that contempt allegations be pleaded in detail?

[431] The Alberta rules make no special provision for the form or content of the pleadings in contempt proceedings. The common law position is that the accused in a contempt proceeding is entitled to have the specifics of the contempt set out in detail. This not only provides knowledge of the case to be met, but also enables the accused to purge the contempt later by complying.

[432] The British Columbia Rules codify this requirement in Rule 56(8), which states that all applications for contempt must be accompanied by an affidavit "setting out the conduct alleged to be contempt of court". The Federal Rules contain a similar proviso in Rule 467(1)(b), which states that the order initiating contempt proceedings "shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person." However, for the same reasons as for Issue No. 8, the Committee decided that no reform was needed in this area for the Alberta rules.

ISSUE No. 65
Should viva voce evidence be required?

[433] As with many motions or applications, evidence in contempt applications is, at least initially, by affidavit. Where the affidavit evidence against the accused is uncontradicted, the common law does not require viva voce evidence. However, there is authority for the proposition that where affidavit evidence is conflicting or relevant facts are otherwise in dispute, it is an error of law to convict for contempt of court without hearing viva voce testimony. This is because the standard of proof is the reasonable doubt standard. On this standard, conflicting affidavit evidence cannot

establish facts beyond a reasonable doubt. It is also explained by the need for assessments of credibility in weighing conflicting evidence.

[434] The rules are silent on what types of evidence are required on contempt proceedings. The Federal Rules, however, require viva voce evidence on all contempt proceedings (Rule 470(1)) unless the court orders otherwise.

POSITION OF THE COMMITTEE

[435] The Committee's view is that while it may be desirable to recognize the importance of viva voce testimony in quasi-criminal matters like contempt proceedings, the Federal Court provision goes further than is necessary to protect the fairness of contempt proceedings, and seems to overstate the common law position in any event. The common law does not require viva voce testimony in all contempt hearings, only those where facts cannot be tried without it.

[436] Further, the Committee decided that restating the common law position with a rule that required viva voce evidence in the event of conflicting affidavit evidence would, for the same reasons enumerated in relation to other procedural protections, be redundant.

ISSUE No. 66
Should hearsay evidence be limited?

[437] The common law makes clear that contempt decisions should not be based on hearsay evidence.[201] The Ontario Rules appear to limit the use of hearsay on contempt motions. Rule 60.11(3) only allows statements of "information and belief" to be used in affidavits on a contempt motion where they related to agreed-upon facts.

POSITION OF THE COMMITTEE

[438] In the Committee's view, the common law adequately addresses this question, and there is no need for further clarification of it in the rules.

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[201] *Kulyk v. Wigmore* (1987), 53 Alta. L.R. (2d) 44 (C.A.):

> We are of the view that a Court should proceed very prudently when asked to cite for contempt of court. As we have already indicated in earlier cases, personal service should be required. Moreover, the motion should beuld not be based upon hearsay evidence.

ISSUE No. 67
Should a right to cross-examination on affidavits be mandatory?

[439] Cory J. in *United Nurses of Alberta* outlined the common law position on the right to cross-examine on affidavits in contempt proceedings:

> A criminal contempt hearing is held as a summary proceeding and the evidence against the defendant may be adduced in affidavit form... Fundamental justice includes the right to cross-examination on the affidavit evidence adduced in the hearing: see R. v. B.E.S.T. Plating Shoppe Ltd. and Siapas (1987), 32 C.C.C. (3d) 417 (Ont. C.A.), at p. 422. This approach is in accordance with the holding of this Court that any party who is the subject of criminal proceedings has the right to cross-examine witnesses on their testimony: see R. v. Potvin, [1989] 1 S.C.R. 525, at p. 543.[202]

[440] Still more recent Alberta case law has held that while the right to cross-examine on affidavits is not absolute,[203] this right ought not to be removed without "good reason".[204] Neither the Alberta nor other provinces' rules reviewed for this project make express provision for a right to cross-examine on affidavits. The Committee does not recommend codification of the right to cross-examine.

ISSUE No. 68
Should the rules relating to holding directors liable for the contempt of their corporations be changed?

[441] Under the Alberta rules, where a judgment against a corporation is "wilfully disobeyed," the court has the power to find one or more of its directors in contempt (Rule 366(b)). The British Columbia Rules also expose directors to contempt liability in the event of wilful disobedience (Rules 56(2)(b)and 56(2)(c)). Neither rule specifies whether it is wilfulness on the part of the corporation or the director. The Ontario Rules also expose directors to liability, but without any "wilful" requirement.

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[202] Cory J. in dissent, *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at para. 30.

[203] *Alberta Union of Provincial Employees v. Continuing Care Employees' Bargaining Assn.* (2002), 303 A.R. 137 at para. 97 (C.A.).

[204] *R.O.M. Construction Ltd. v. Heeley* (1982), 20 Alta. L.R. (2d) 200 at 204 (Q.B.).

[442] At common law, the longstanding principle of *Salomon v. Salomon* shields directors from liability for the acts of their corporations. Only if a director can be said to be the "controlling mind" of the corporation can they be held, at common law, in contempt. Without this element, the *actus reus* of the offence has not been proven.[205] If a director is the controlling mind, then they can be held liable for corporation contempt.[206]

[443] If the rules did not contain the "wilful" element in respect of corporate contempts, then the question might arise as to the constitutionality of rules that purport to make directors criminally liable for the acts of a corporation without requiring any mental element on the part of the directors. For this reason, the Ontario provisions seem more vulnerable than the ones in Alberta and British Columbia.

POSITION OF THE COMMITTEE

[444] In the Committee's view, the current "veil-piercing" contempt provisions are appropriate and need no reform, except to advise that the term "wilful" remain an essential part of any such provision.

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[205] *Glazer v. Union Contractors Ltd.* (1960), 26 D.L.R. (2d) 349 at 353 (B.C.C.A.) per O'Halloran JA.

[206] See *Québec (Commission des valeurs mobilières) c. Lassonde*, [1994] A.Q. no. 1073 (C.A.).